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ABSTRACT

The first chapter of this monograph on sport law presents tort issues, primarily negligence. A discussion of some fundamental negligence concepts is followed by three sections devoted to the prime risk areas in school and collegiate settings. A review of the principles of risk management is included. The second chapter focuses on contractual matters. Among the topics covered are lease agreements, agreements with concessionaires, athletic scholarships, vendor contracts, and employment contracts with coaches. The independent contractor relationship is also addressed. The third chapter reviews constitutional law principles as applied to sport settings. First amendment issues including freedom of speech, freedom of religion, and establishment of religion are presented. A review of the legal challenges raised to drug testing programs is provided. Due process considerations are covered with a discussion on state action and liberty and property interests in sport. A section on equality of programs discusses the legal challenges made to sex-based discrimination in athletic participation and coaching. A table of cases concludes the monograph. (JD)

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Linda A. Sharp

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No. 40 in the NOLPE Monograph Series

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Linda A. Sharp

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1
Introduction

Sport law is a relatively new field of law which applies legal theory and precedent to issues arising from the conduct of sport and physical activity ranging from professional athletics to municipal recreation programs. In this monograph, I will focus on three primary areas of concern for those who deal with sport law matters in public school or collegiate settings. The first chapter of the monograph will present tort issues, primarily negligence. After briefly discussing some fundamental negligence concepts, there will be three sections devoted to the prime risk areas in school and collegiate settings (i.e., supervision, conduct of the activity, and equipment and facilities). These sections will be followed by a review of the principles of risk management in the belief that the best way to approach negligence concerns is with a preventive mentality.

The next chapter of the monograph will focus on contractual matters. After discussing the basic principles underlying contract law, a number of substantive concerns for sport administrators will be presented. Among the topics covered are lease agreements, agreements with concessionaires, athletic scholarships, vendor contracts, and employment contracts with coaches. The independent contractor relationship is also addressed.

The last chapter of the monograph will review constitutional law principles as applied to sport settings. First amendment issues including freedom of speech, freedom of religion, and establishment of religion will be presented. Next, a review of the legal challenges raised to drug testing programs will be provided. The next section focuses on due process considerations with a discussion of state action and liberty and property interests in sport. Finally, a section on equality of programs discusses the legal challenges made to sex-based discrimination in athletic participation and coaching. Equal protection, title IX, title VII, and the Equal Pay Act are components of this segment.

A very wide spectrum of sport law topics is presented in this monograph. Thus, of necessity, the treatment of each area is limited to an overview of the major legal concepts and cases. I have chosen particular cases because they exemplify certain legal principles or trends in sport law. The references, therefore, are selective not comprehensive.

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Tort Law

Fundamental Negligence Principles

It is presumed that the reader is familiar with the basic tenets of negligence law. The standard of care which is imposed upon the sport law professional consists of the obligation to act as a reasonable prudent teacher, coach, or administrator would act in a particular situation. Each sport law professional is held to possess that level of expertise appropriate to his position. A breach of this standard of care will result in a finding of negligence assuming that the other elements of causation and damages also exist.

It is important to address, however, one critical area regarding the defenses which are currently viable in the sport injury arena. The erosion of the assumption of the risk doctrine is a fundamental area to understand for anyone who has teaching, coaching, or administrative responsibilities in sport and physical activity. Cases in the last decade have shown a marked tendency to transfer more and more of the responsibility to the shoulders of those who administer, supervise, instruct, and coach. The courts have effected this doctrinal transformation by increased emphasis on the factor of *understanding of the risks involved* in an activity.

For the assumption of risk doctrine to be applicable, three elements must exist. First, the plaintiff must *know* of the danger to be encountered. Second, the participant must *understand* the risk involved. Third, the plaintiff must *voluntarily* expose himself to danger.

Knowledge of risk in itself is not sufficient; it is not enough to simply inform of risks. There must be an understanding and appreciation of that risk. In this context it is important to understand the effect which *Thompson v. Seattle Public School District*,[1] a 1982 decision, has had on the assumption of risk doctrine.

In this seminal case, Christopher Thompson, a high school football player, was seriously injured when he used his head as a battering ram as he was about to be tackled. He claimed at the trial that his coach failed to properly warn him of the danger of catastrophic injury connected with using the helmet in this fashion. A jury awarded the plaintiff, a permanent quadriplegic; a landmark $6.4 million. The jury based its award on the fact that the plaintiff had not been warned of the possibility of serious and permanent injury.

1. Thompson v. Seattle Pub. School Dist., unpublished decision.

The *Thompson* case not only eviscerated the assumption of risk defense, it, in effect, created a new cause of action for failure to warn in a sport-related situation. Until *Thompson*, it seemed clear that participants assumed the normal risks incident to a game and that participants may be assumed to understand the basic risks inherent in the activity. In *Vendrell v. School District #26C*,[2] a 1962 decision, we have a set of facts almost identical to the *Thompson* scenario. However, the court made it clear that "no prospective player need be told that participants in the game of football may sustain injury."[3] In view of the *Thompson* decision, not only must the players be warned that participation in the activity may result in injury, but more importantly, the *specific* risks inherent in the activity need to be addressed. The spectre of catastrophic injury, if it exists in an activity, must be clearly and fully set forth in order for a participant to *understand* the risks involved.

The failure to warn issue is of critical importance. Coaches must convey sufficient warnings to participants. It is highly suggested that these warnings be conveyed both orally and in a written fashion to students and parents (for minor participants). Films have been developed which warn of the specific risks involved in athletic participation. These warning systems should be incorporated into the risk management program, which will be discussed in a later chapter.

Supervision

There are three areas of concern which lead to the majority of litigation relating to physical education and athletic programs. These areas are: (1) supervision, (2) conduct of the activity, and (3) environmental conditions—equipment and facilities. Each of these will be addressed in a separate section.

Proper supervision is concerned with both the quantity and quality of the supervisory personnel. Thus, not only must an adequate number of individuals serve as supervisors, these individuals must be competent to serve in that capacity and act as reasonable prudent supervisors.

Quantity of Supervision

In terms of the adequacy of numbers (i.e., the ratio between supervisory personnel and participants), the issue must be determined in the context of a specific situation. There is, unfortunately, no one proper ratio which can be relied upon when developing supervisory plans. A review of the case law finds a wide range of ratios which were deemed acceptable by courts, based on their particular factual situations. The issue, of course, is that, as in all areas of negligence, reasonable supervision can only be judged in terms of a specific setting. Thus, whereas a ratio of 40:1 may be perfectly reasonable in some situations, a ratio of

2. Vendrell v. School District #26C, 376 P.2d 406 (Or. 1962).
3. *Id.* at 412-13.

20:1 may be suspect in others. In choosing the number of supervisors to be assigned, factors such as the age and maturity of the participants, the activity setting, any propensities the group has shown toward rowdiness, and problems inherent in the area/facility itself must be considered. Some illustrative cases follow.

Three cases dealing with playground supervision of very young children illustrate the range of supervisory ratios which have been considered. First, in a District of Columbia case, a kindergarten student was injured during recess when another student hit him in the eye with a stick. This injury caused the loss of sight in that eye. The ratio in this situation was approximately forty-eight students to one teacher. The teacher in question was acting diligently in her efforts to observe the children. Although the jury returned a verdict of $150,000 in favor of the injured student, the appeals court reversed the decision. In holding that the school is not the insurer of the safety of the children in its care, the court noted that the injury was the result of an unforeseeable act by another student which could not have been prevented.[4]

The second case, from Louisiana, also concerned a playground injury to a kindergarten student, who was hurt as a classmate wrapped his legs around him causing both boys to fall from the horizontal bars. The supervisory ratio in this case was approximately 100:1. The appeals court affirmed the judgment of the trial court in favor of the school board. The court remarked that it would be virtually impossible absent a ball and chain to have constant supervision of all pupils.[5]

The third case, also from Louisiana, involved injury to a six year old on the playground. The student was injured as she tried to slide down a tether ball pole located next to the monkey bars. In this instance, the Supreme Court of Louisiana held the ratio of 150:1 "totally inadequate and virtually impossible."[6] These three cases stand for the proposition that although the prevention of *all* mishaps is unrealistic since some injuries are unforeseeable, a ratio of supervisory personnel to participants must be in a range which allows a supervisor the possibility of being effective.

The competency/maturity of the student is also a factor to be considered when determining the appropriate supervisory ratio. In a Louisiana case, a mentally retarded student was killed by an automobile as the basketball team of which he was a member walked to an off-campus facility for practice. Although there usually would have been two teachers present to supervise the eleven players, one teacher was detained in class on the day in question. The appeals court affirmed the decision of the trial court in favor of the decedent. There was a breach of duty in the

4. District of Columbia v. Cassidy, 465 A.2d 395 (D.C. 1983).
5. Collins v. Bossier Parish School Bd., 480 So. 2d 846 (La. Ct. App. 1986).
6. Gibbons v. Orleans Parish School Bd., 391 So. 2d 976 (La. Ct. App. 1980).

failure to provide an adequate number of supervisors.[7] Due to the special population needing supervision in this case, a ratio of 11:1 was not reasonable.

The nature of the activity also has a bearing on the issue of reasonable ratios. For instance, in an Illinois case, an appeals court held that a ratio of 20-25:1 is not reasonable for the supervision of activity on four trampolines.[8] The risks inherent in this type of activity necessitated a lower supervisor/student ratio. In contrast, a ratio of 40:1 was held to be responsible supervision in a softball game. In another Louisiana case, a nine year old was injured as he went behind the batter to pick up his fielding glove. The head injuries which he suffered resulted in his death four days later. The appeals court reversed the trial court's award of $290,000 as it held that the supervision was reasonable under the circumstances of the case.[9]

Finally, the propensities of a particular group or individual student toward rowdy behavior bears on the issue of reasonable supervision. In a Missouri case, fatal injuries were suffered by a student who was engaged in a scuffle with a fellow student on the stairway leading from the locker room to the gymnasium. The plaintiff alleged that the school authorities, despite actual or constructive knowledge of the quarrelsome propensities of the fellow student, failed to take additional precautions to supervise that individual. The trial court granted summary judgment to the defendants on the issue of governmental immunity. The appeals court held that teachers are not immune from tort liability for inadequate supervision and remanded the case for proceedings on the issue of supervision.[10]

Quality of Supervision

The preceding cases have all dealt with the issue of reasonable supervision in terms of the numbers of assigned personnel present for supervisory duties. The issue of whether the individuals are indeed *acting* as reasonably prudent supervisors is the subject of this section.

Although I'm sure that most of us would concur with one court's statement that parents do not send their children to school to be returned to them maimed because of the absence of proper supervision or abandonment of supervision, we must begin with the premise that even reasonable supervision will not be able to prevent *all* injury. For example, in a Tennessee case, eighth grade students were engaged in a softball game. One student, who was playing the position of catcher, was injured as the bat slipped out of the batter's hands and hit the catcher in the face. Although the injured student contended that the teacher

7. Foster v. Houston Gen. Ins., 407 So. 2d 759 (La. Ct. App. 1981).
8. Chilton v. Cook County School Dist. No. 207, 325 N.E.2d 666 (Ill. App. Ct. 1975).
9. Ferguson v. DeSoto Parish School Bd., 467 So. 2d 1257 (La. Ct. App. 1985).
10. Kersey v. Harbin, 591 S.W.2d 745 (Mo. Ct. App. 1979).

should have been closer to the action and thus able to prevent the occurrence, the appeals court disagreed. The court believed that the incident could not have been foreseen and thus, the teacher's supervision was reasonable.[11] If the facts had been altered to show that the teacher should have been aware that the injured student was assuming a dangerous position by moving in too close to the batter, then the outcome should also have changed because a reasonably prudent supervisor should have been able to foresee the danger in that hypothetical situation. In a New York case, an eighth grader was injured during a wiffleball game played in a physical education class. A member of the opposing team hit the injured student in the face. The instructor was only twenty-five feet away from the students and reached them in a few seconds. There was no forewarning that the students were about to engage in a physical confrontation. The appeals court concluded that the supervision was reasonable since the need for close proximity to the students could not have been foreseen.[12] It is not the function of the school district to serve as the insurer of students' safety.[13] The courts acknowledge that a teacher cannot give personal attention to every student all of the time.[14]

The issue is one of reasonable supervision under the circumstances and there are a number of recurring issues in supervision which invite discussion. First, an instructor does not act reasonably in leaving a class unattended while he ministers to the needs of an injured participant. The seminal case for this proposition is a New Jersey case in which a student who used a springboard became paralyzed. The springboard was used when the teacher left the class to care for an injured student.[15] Procedures must be developed which allow injured students to receive timely medical attention without leaving a class unsupervised.

Secondly, the personnel who are assigned to supervise physical activity settings must be competent to do so. Where students are involved in physical activity, the assigned supervisor must be capable of recognizing what may constitute dangerous activity. Thus, in a New York case, a non-Spanish-speaking teacher who had no background in physical education was assigned to do playground supervision. The Spanish-speaking students persuaded the teacher to allow them to play "bombardment," a form of dodgeball. One student was struck in the eye with a ball and suffered serious injury.[16] A qualified supervisor would have recognized the danger inherent in the situation and would not have allowed the game to take place. A similar factual occurrence also led to

11. Brackman v. Adrian, 472 S.W.2d 735 (Tenn. Ct. App. 1971).
12. Hanley v. Hornbeck, 512 N.Y.S.2d 262 (App. Div. 1987).
13. District of Columbia v. Cassidy, 465 A.2d 395 (D.C. 1983).
14. Banks v. Terrebonne Parish School Bd., 339 So. 2d 1295 (La. Ct. App. 1976).
15. Miller v. Cloidt, No. 17241 (N.J. Super. Ct. 1964).
16. Rivera v. Board of Educ., 201 N.Y.S.2d 372 (App. Div. 1960).

liability in a Michigan case. The school principal assigned an inexperienced substitute teacher to supervise recess. While playing "kill," an elementary school student was injured. The principal, in each of these cases, was held liable in negligence for assigning an incompetent person to supervise physical activity.[17] In this same vein, an administrator should choose a qualified replacement to supervise a physical education class if the teacher's presence is required elsewhere.[18]

Third, administrators must develop and implement reasonable supervisory plans. These plans must not only be adequate in terms of the number of personnel provided but give direction to the supervisors regarding their expected conduct and areas of responsibility. A California case illustrates this concept nicely. In this situation, a high school student was killed in a "slap boxing" fight with another student. The fight occurred during the noon recess in an outdoor area near the gymnasium. The altercation went on for approximately five-to-ten minutes and a crowd of thirty students gathered to watch. The deceased suffered a skull fracture after he fell on the asphalt pavement. There was no supervisor in the area. The deficiencies in supervision were laid directly at the feet of the school administration. Although general supervisory plans existed, there was no formal schedule assigning supervision times and areas of responsibility. This lack of definitiveness was a fatal flaw according to the appeals court which reversed the trial court's decision to grant a directed verdict for the defendants. Roughhousing and horseplay are normal activities for high school boys and proper supervision should be able to control this kind of conduct.[19] Supervisory plans must be explicit in setting forth times of supervision and areas of responsibility.

Crowd Control

An area of increasing concern in regard to supervision is the issue of crowd control for interscholastic and intercollegiate athletic contests. The courts expect adequate supervision and adherence to accepted crowd control procedures. The facility administrator has a duty to protect those attending the contest in regard to acts of negligence by the facility's personnel as well as reasonably foreseeable acts by third parties. It is this latter issue which has become of increasing concern.

The pivotal case for the proposition that proper crowd control involves the prevention of reasonably foreseeable acts of third parties is *Bearman v. University of Notre Dame*. In that case, a patron who had attended a university football game was injured in the parking lot as she left the game. The plaintiff's leg was broken as a third party who had been "tailgating" became involved in a fight with another patron and

17. Cook v. Bennett, 288 N.W.2d 609 (Mich. Ct. App. 1979).
18. Marcantel v. Allen Parish School Bd., 490 So. 2d 1162 (La. Ct. App. 1986).
19. Dailey v. Los Angeles Unified School Dist., 87 Cal. Rptr. 376 (1970).

fell onto the plaintiff. The university's defense was that it could not be held liable for the actions of the third party since it had no actual knowledge of any danger to the plaintiff. An Indiana court of appeals disagreed as it imputed constructive knowledge of danger to the university since the university was: (1) aware of the tailgate parties, (2) aware that the drinking of alcoholic beverages occurred at the parties, and (3) aware that intoxicated persons pose safety threats to other patrons.[20] Thus, the injury to the plaintiff was reasonably foreseeable and required supervisory measures to be undertaken in regard to this hazard.

It is this type of reasoning which should encourage administrators to provide reasonable supervision in situations which may allow for violent behavior due to an intense rivalry between the schools or in which there is a history of disruptive behavior in prior contests. If it is foreseeable that the climate of the contest would encourage disorderly behavior, additional crowd control measures should be taken. Once again, however, the administration is not held to be the insurer of patrons' safety. In an Oregon case, a student fan was assaulted by three other students while he attended a girls' basketball game. No supervisory personnel were present except for the coaches of the teams. In this situation, however, the lack of supervisory personnel was held to be reasonable. The appeals court was persuaded by the fact that there was no rivalry between the schools nor was there a history of prior violent behavior or disruption.[21]

Summary

Supervisory concerns are quantitative and qualitative in nature. The quantitative dimension is addressed by close attention to the factors which affect the reasonableness of the ratio of supervisory personnel to participants. These factors include: (1) the age and maturity of the participants, (2) the activity setting, (3) group propensities toward misbehavior, and (4) problems inherent in the area/facility.

In terms of qualitative concerns, only personnel who are competent to recognize dangers inherent in the activity setting should be assigned to supervisory duty. Emergency medical procedures must be developed so that supervisors never leave participants unattended in order to care for an injured person. Supervisory plans must give specific direction to supervisors regarding their expected conduct and areas of responsibility. Finally, crowd control measures must be developed which address all foreseeable risks, including reasonably foreseeable acts by third parties.

Conduct of the Activity

This section will deal with three issues relating to the conduct of the activity. First, the focus will be on the responsibilities of the instructor/

20. Bearman v. University of Notre Dame, 453 N.E.2d 1196 (Ind. Ct. App. 1983).
21. Cook v. School Dist. UH3J, 731 P.2d 443 (Or. Ct. App. 1987).

coach to conduct a program in a reasonably prudent manner. This aspect will include: (1) adequate instruction in the activity including the use of proper progressions, (2) the dissemination of safety rules and warnings, (3) the proper matching of participants, and (4) the adherence to guidelines and syllabi. A second issue relates to administrative responsibilities regarding the selection and supervision of instructional personnel. A final concern is the provision of adequate medical care for injured participants.

The ramifications of inadequate instruction in a physical activity are often different in kind and degree than poor instruction in most other settings. If an English teacher fails to act as a reasonably prudent instructor and negligently informs the class that Victor Hugo was the author of *Othello*, a student will suffer some slight intellectual discomfort and some considerable embarrassment should he appear as a contestant on a quiz show. However, if a physical educator fails to act as a reasonably prudent instructor in a gymnastics setting and advises students how to do a forward roll incorrectly, the result may well be severe physical injury. Thus, the realm of inadequate instruction in a physical activity encompasses some added concerns.

Fortunately for educators and coaches, the courts have come a long way in their understanding of activity settings since *Bellman v. San Francisco High School District* was decided in 1938. In that situation, a sophomore student suffered a head injury as she performed a gymnastics stunt. The plaintiff's case was based on allegations of improper instruction. The plaintiff prevailed in this case but the interesting point was that the defendant was precluded from placing into evidence information regarding the activity as well as curriculum guides. The jury was given great latitude in its findings and the teacher was unable to give evidence regarding his duty of care.[22] In contrast, the case of *Lueck v. City of Janesville* stands for the proposition that the courts now allow a great deal of evidence to be submitted in reference to the standard of care to be applied. In this situation, a high school student was injured on the still rings. The teacher was able to prevail largely because he was able to provide substantial proof (e.g., safety procedures used, progressions taught, expert witnesses in gymnastics) that he was indeed acting as a reasonable prudent educator.[23] The pivotal point to understand from the teacher's perspective is that documentation of the teaching methods employed, the progressions used, and the safety procedures implemented are critical factors in enhancing a teacher's chances of success in a lawsuit.

As with the issue of supervision, instructors are not held to be insurers of the safety of the students. Thus, a teacher/instructor who has met his responsibilities as a reasonable prudent instructor and can *prove* he did

22. Bellman v. San Francisco High School Dist., 11 Cal. 2d 576 (1938).
23. Lueck v. City of Janesville, 204 N.W.2d 6 (Wis. 1973).

so, should be able to prevail. In a Maryland case, a high school senior fractured his neck while performing on the trampoline. Allegations of improper instruction led to a lawsuit. The trial court found no negligence and the appeals court upheld the decision in favor of the defendants. In finding for the defendants, the court stated that, "[t]he courts are just as much a shield to a teacher who has acted prudently as they are a weapon against him if he has neglected his duty."[24]

Adequacy of Instruction

On this note, a review of cases which illustrate some of the particular issues raised in regard to the adequacy of instruction follow. In a New York case, an eleven year old was injured while attempting a headstand. The failure of instruction was in regard to two factors: first, there was a failure to use proper preparatory activities before proceeding to the headstand; second, the actual instruction at the time of injury was given by a student teacher. The court held that there was a lack of progression as well as improper delegation of teaching responsibilities.[25]

The issue of proper demonstration of activities has a critical importance in physical activity settings. In an Indiana case, a student was injured during an attempt at a vertical jump as she hit her mouth on the wall. The instructor did not demonstrate to the class that the jump should be attempted from a standing start and she allowed the students to run at the wall, a clearly unsafe practice. The trial court found for the defendant and the appeals court reversed and remanded.[26]

Proper instruction also involves the ability to position equipment properly and to advise students regarding the characteristics and usage of the equipment. In Rhode Island, a fifteen year old student was in training for the school's crew team. As a part of the practice session, the students participated in the Harvard Step Test which involves stepping repeatedly up and down on a bench. During the exercise she lost her balance and fell. The bench had been positioned by the coach on an uneven surface. The First Circuit Court of Appeals found that it would be reasonable to conclude that the plaintiff's fall was caused by the improper placement of the bench by the coach. The case was remanded for a jury trial.[27] In another case dealing with equipment, it was held that adequate instruction includes the dissemination of information about the characteristics of equipment. Students were injured as they hit their heads on a low ceiling after jumping on a springboard. No instruction had been given regarding the proper usage of the springboard and its unique propulsion properties.[28]

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24. Berg v. Merricks, 318 A.2d 220 (Md. Ct. Spec. App. 1974).
25. Gardner v. State, 22 N.E.2d 344 (N.Y. 1939).
26. Dibortolo v. Metropolitan School Dist. of Wash. Township, 440 N.E.2d 506 (Ind. Ct. App. 1982).
27. Hornyak v. The Pomfret School, 783 F.2d 284 (1st Cir. 1986).
28. Grant v. Lake Oswego School Dist. No. 7, 515 P.2d 947 (Or. Ct. App. 1973).

The language used by the instructor must be clearly understandable to the participants, taking into consideration their age and experience. In a New York case, a fifth grade student was hurt as she stood in the rings and jumped backwards out of them. The teacher told the students that they could do anything on the rings except swing. The injured student acted in accordance with these directions, which were insufficient and inappropriate for the class.[29] In this connection, a teacher must be able to anticipate the types of frolics and misbehavior in which students often engage. Once again, it is the issue of foreseeability which governs. Would a reasonable prudent instructor be able to foresee the type of behavior engaged in by students who disregard instruction or misuse equipment? Sometimes a student's actions are truly unforeseeable as in the case of a six year old who tied his jump rope to a jungle gym and began to swing on it. The court agreed that this type of behavior was not able to be anticipated.[30]

Another issue which a reasonable prudent instructor or coach has to take into consideration is the participant's physical condition. In an Oregon case, a student's mother requested a school counselor to supply a list of exercises which were to be performed in a physical education class because the student in question had back problems which would prevent her from engaging in some types of activities. The school did not provide the listing even though the request was repeatedly made, and the student was injured while performing an exercise which the student's doctor would have forbidden, if he had been able to review the course of exercises. The trial court's verdict for the plaintiff was upheld on appeal. The injury was foreseeable in this situation because if the list of exercises had been provided as requested, the doctor would have advised the school of the hazard to the student in doing this exercise.[31]

Certainly, if a coach knows that a participant has not recovered from an injury, the player must be kept from further competition. In a Washington case, a high school football player received back injuries during practice. The coach "permitted, persuaded, and coerced" the player to participate in a game two weeks later even though he knew that the player had not recovered from his injuries. The Washington Supreme Court held in favor of the plaintiff.[32] The above case was decided in 1931 as a case in negligence. If the same facts were evident in a case today it could be brought as a case in willful and wanton misconduct (reckless misconduct) since the coach clearly disregarded the safety of the player.

An Illinois case dealing with the issue of willful and wanton misconduct in a school instructional setting concerned an overweight fifteen year old student who was seriously injured as she executed a backward

29. Armlin v. Board of Educ., 320 N.Y.S.2d 402 (App. Div. 1971).
30. Clark v. Furch, 567 S.W.2d 457 (Mo. Ct. App. 1978).
31. Summers v. Milwaukie Union High School Dist., 481 P.2d 369 (Or. Ct. App. 1971).
32. Morris v. Union High School Dist. A, 294 P. 998 (Wash. 1931).

roll. The student was 5'6" tall and weighed 180 pounds. Thus, her physical attributes mandated against engaging in this activity. Additionally, she had already expressed a fear of attempting this exercise. The instructor disregarded her physical condition and her psychological discomfort and directed her to perform the roll. The plaintiff was able to prevail by proving that this behavior by the instructor was willful and wanton misconduct.[33] The proposition from this case is clear. If a student is physically and/or psychologically incapable of performing a certain activity (or there is a reasonable doubt about the student's ability to perform the activity), he must not be ordered or coerced into attempting it.

The final issue to be discussed relative to adequacy of instruction has to do with the coach's teaching or condonation of activities that may be helpful in the pursuit of victory but pose a danger to the participants. In a New York case, a high school baseball player who was a runner on third base tried to bowl over the catcher by using his head as a "battering ram" on a failed squeeze play.[34] As a result of the collision, the student became a permanent quadriplegic. The allegations by the student were not that the coach failed to instruct him properly in the fundamentals of baserunning. Rather, the student alleged that the coach had praised him when he "ran over" an opposing catcher in a previous contest. The coach's praise had motivated him to attempt this dangerous practice again, this time with tragic results. On the trial level, the injured student was awarded $1.8 million. Although this award was ultimately reversed by the court of appeals on the basis that the student assumed the risk by being fully aware of the danger of the activity in question, it is my opinion that this court did not fully appreciate the requirement that activity, to be considered an assumption of risk, must be truly "voluntary." It is my belief that the relationship which exists between a coach and player is so psychologically powerful that a coach's praise is a very intense driving force. Thus, a coach who rewards unsafe play by praising a player, in effect, mandates the repetition of that behavior at a later opportunity. It is, therefore, nonsensical to argue that the player understood fully the risks of engaging in that behavior when the issue of "voluntarism" is the critical factor to address. A coach's rewards dictate behavior in a psychological sense and a player's only real choice is to please the coach. Because of the nature of the relationship, coaches must immediately sanction players for engaging in dangerous activities, regardless of whether the dangerous practice results in a competitive advantage for the team. Also, the foregoing case involved a high school student who had considerable experience with the sport. It is highly unlikely that a younger player who was in a similar situation would have understood so well the nature of the risks. Therefore, even

33. Landers v. School Dist. No. 203, 383 N.E.2d 645 (Ill. App. Ct. 1978).

34. Passantino v. Board of Educ. of City of N.Y., 383 N.Y.S.2d 639 (App. Div. 1976), *rev'd*, 395 N.Y.S.2d 628 (1977).

under this court's analysis, a younger plaintiff would not have assumed the risk in a similar situation.

As a contrast to the above scenario, however, it is expected that coaches will teach players to be aggressive and intense. In a New Jersey case, a high school soccer coach was sued by a player from an opposing school who received injuries during the course of a game between the two schools. The injured player alleged that the coach instructed his players to compete in an aggressive and intense manner which led to the injuries sustained. The court ruled in favor of the coach as it stated that: "teaching players to be intense and aggressive is an attribute." There was no evidence to suggest that the coach had instructed his players to injure their opponents.[35] The coach does not violate his duty of proper instruction by instilling a competitive drive within his team. However, there must be no instruction or condonation of dangerous behavior in the quest for victory.

Dissemination of Safety Rules and Warnings

As discussed earlier in conjunction with the *Thompson* case,[36] the issue of "failure to warn" has become an increasingly potent weapon for a plaintiff's attorney. Thus, even if an activity is conducted in a reasonably prudent manner, there still may be liability based on a failure to warn of the specific risks inherent in an activity. This requisite of full disclosure rests on the premise that participants need full information regarding the risks of an activity in order to make a truly informed decision about participation.

Underlying the discussion of warnings is the belief that warnings are unnecessary for participants who already understand and fully appreciate the inherent risks of an activity. However, it is imprudent for administrators to take the position that, as a matter of common sense, participants should have this knowledge. For example, the *Thompson* case, as discussed earlier, clearly modified the common sense notion upheld twenty years earlier in the *Vendrell* decision[37] in which the court held that it could be reasonably assumed that high school football players knew that football involves a risk of injury, of varying degrees and kinds. Since common sense is no longer an appropriate guideline in this realm of the law, it is highly recommended that programs involving physical activity, regardless of the age and skill level of the participants, institute full warning systems. Particularly in this area of concern, an ounce of prevention is worth a pound of cure. For example, in a recent case dealing with an injured collegiate football player from the Citadel, it was held that this particular player knew full well the dangers inherent in football. However, collegiate administrators should not generalize from

35. Nydegger v. Don Bosco Preparatory High School, 202 N.J. Super. 535 (Super Ct. Law Div. 1985).
36. Thompson v. Seattle Pub. School Dist., unpublished decision.
37. Vendrell v. School Dist. #26C, 376 P.2d 406 (Or. 1962).

this finding to collegiate players at large because the student in this situation had knowledge not readily available to other university participants (i.e., the wisdom and experience accumulated growing up in a family where his father was a professional football player for a number of years).[38]

Relative to the foregoing, written warnings should be conveyed to all participants regarding the specific risks inherent in an activity. Warnings must be tailored not only to the peculiar aspects of each activity but the language must be clear and understandable for the age and maturity of the participants.

The warning posters and stickers received from equipment manufacturers should be prominently displayed.[39] Warning labels should be replaced if they become illegible. There will be a more complete discussion of warnings and waivers in connection with the material dealing with the development of a risk management program.

In conjunction with safety procedures instituted in an instructional environment, the teacher has an obligation to advise participants what to do if a dangerous situation arises during the activity. In a New York case, two ten year old students collided during soccer class as they reached the ball simultaneously. Although the teacher had covered basic soccer skills in class, no information had been given about safety measures to be taken by players in such a situation. The court believed that proper instruction must cover safety matters as well as fundamental skills.[40]

Proper Matching of Participants

In activities which involve contact, consideration must be given to match participants so that disparities in size, maturity, or skill level do not lead to unsafe conditions. Upon initial consideration, one might think that mismatching becomes an issue only when the physical activity is a collision sport. However, one student who was hurt in a soccer game, prevailed in a negligence suit based on a failure to match students by height and weight. The student was injured as he collided with a much larger student. No effort had been made by the teacher to segregate the participants by size.[41] In a New Jersey case, a female student of average size was injured as another student hit her in the mouth with a field hockey stick. The student who struck her was a 6'7" basketball player. The appeals court upheld the decision for the plaintiff who was injured because of the size, strength, and skill disparity among students.[42]

38. Buoniconti v. The Citadel, unpublished decision.
39. Pell v. Victor J. Andrew High School, 462 N.E.2d 858 (Ill. App. Ct. 1984).
40. Darrow v. West Genesee Cent. School Dist., 342 N.Y.S.2d 611 (App. Div. 1973).
41. Brooks v. Board of Educ. of City of N.Y., 238 N.Y.S.2d 963 (1963).
42. Trenton Times, March 3, 1986.

The scheduling of athletic contests must also give consideration to the issue of mismatched participants. In a New York case, a high school football player sustained injury allegedly because he was playing in a mismatched game in a fatigued condition. The team on which the injured student participated had a very poor record. The principal of the school had requested that his team be assigned to a less competitive division because it was clear that his football team was outmatched. However, the league supervisor denied the request. On the day of the injury, the student's team was playing a vastly superior team. The principal and the coach had discussed refusing to play the contest because of the high risk of injury. Nevertheless, the game went forward and the plaintiff, who had played virtually every down because of a lack of qualified replacements, was injured near the end of the first half. The student prevailed at the trial court level. Upon appeal to the Supreme Court Appellate Division, the lower court decision was affirmed. The school unreasonably enhanced the risk of injury to the student by playing this contest which had an evident risk of injury.[43] Based on this line of reasoning, athletic directors who, in an effort to line the school's coffers, schedule opponents who are vastly superior may be held to be negligent in doing so if injury results because of substantial size and skill differentials.

Adherence to Guidelines and Syllabi

If curriculum guidelines exist in regard to an activity, it is prudent for an instructor to follow those guidelines which have a bearing on the safety of the participants. In a New York case, a junior high student was injured during a speed test which was mandated by the state. The guidelines provided by the state relative to the placement of cones were altered by the teacher. The alteration resulted in a dangerous design of the speed course and the student was injured as she ran into a wall.[44] It is difficult for an instructor to prevail in a situation in which guidelines, which have been drafted with consideration of the safety of participants, are disregarded or altered. In an earlier New York case, an instructor deviated from a syllabus for line soccer which provided that only two participants at a time should chase a ball. To allow for greater participation, the instructor permitted eight students to chase the ball. A student was injured as a number of other players fell on her. The desire for greater participation cannot outweigh considerations of safety, which were set forth in the syllabus.[45] If an instructor ever wishes to deviate from a curriculum guide or syllabus, there should be documentation, from expert curricular sources, that the contemplated deviation is as safe or safer than the method(s) set forth in the guide or syllabus. If

43. Benitez v. New York City Bd. of Educ., 530 N.Y.S.2d 825 (App. Div. 1988).

44. Ehlinger v. Board of Educ. of New Hartford Cent. School Dist., 465 N.Y.S.2d 378 (App. Div. 1983).

45. Keesee v. Board of Educ., 235 N.Y.S.2d 300 (Sup. Ct. 1962).

the instructor cannot provide this evidence, it will be difficult for the teacher to show that he acted as a reasonable, prudent person in deviating from guidelines which were prepared with safety in mind.

Careful consideration must also be given by athletic associations in developing recommendations for the conduct of practices and scrimmages. In an Oregon case, a high school football player was injured on the second day of preseason practice during a contact scrimmage. The student, who was rendered a paraplegic, sued the Oregon State Athletic Association for its failure to adopt a recommendation of the National Federation of State High School Associations that prohibits game condition scrimmages before two weeks of practice have been concluded. At the trial court, the plaintiff received an award of $980,000 which was affirmed on appeal.[46] Using the same line of reasoning, athletic administrators should insure that guidelines of governing bodies are met, even if the guidelines are only advisory in nature. The guidelines are evidence of an expert view of what constitutes prudent safety procedures.

Administrative Responsibilities — Selection and Supervision of Instructional Personnel

There are two cases which illustrate the degree to which courts believe that administrators should take an active role in supervising the instructional activities of teachers and coaches. In a Minnesota case, an eighth grader was severely injured as he performed a gymnastics exercise known as a "headspring over a rolled mat," a required activity in his physical education class. The student landed on his head, resulting in quadriplegia.

The teacher of the class was a first year teacher who became the instructor in mid-semester when the former teacher resigned. The teacher's negligence lay in the fact that he had failed to instruct the class in the necessary progressions which are designed to lead up to the headspring.

The alleged negligence of the principal lay in his failure to exercise reasonable case in supervising the development, planning, and administration of the physical education curriculum. The principal did not meet with the teacher to discuss the transition in leadership of the class nor did he require the new teacher to submit any lesson plans. The Minnesota Supreme Court found that the principal had abdicated his responsibility for instructional supervision. Despite the fact that an inexperienced teacher took over in a difficult situation, the principal did not supervise his teaching. In this case, the failure of supervision was negligence in administering the curriculum.[47]

In a Michigan case, a high school student was injured at a weightlifting training session held during the summer in preparation for football

46. Peterson v. Multnomah County School Dist. No. 1, 668 P.2d 385 (Or. Ct. App. 1983).
47. Larson v. Independent School Dist. No. 314, 289 N.W.2d 112 (Minn. 1979).

team tryouts. The student tried to lift weights, at his coach's urging, well beyond his capacity. He fell in his attempt and became a paraplegic.

The allegations against the principal asserted that he failed to exercise close supervision over the coach even though he knew that the coach was sometimes "too rough" on his players. Also, the summer weightlifting program was purportedly in violation of high school athletic association rules (i.e., within the realm of the principal's responsibilities). The appeals court agreed with the plaintiff's contention that the principal failed to reasonably exercise his supervisory powers.[48]

The hiring of qualified personnel to teach or coach is also an important administrative responsibility. In one case, an award of $385,000 resulted when an admittedly unqualified instructor was hired to teach and coach wrestling. A student became a quadriplegic as a result of the instructor's negligent activities and the negligence of the school district in hiring the unqualified coach.[49]

Two golf cases also emphasize the need to obtain competent instructors.[50] In both situations, a regular instructor did not conduct the class. In the first case, a student was killed as he was struck by a golf club swung by another student. On that day, a student teacher was supervising the class activities. Although a safe procedure had been established for this activity, the class arrangement differed from the recommendations. In view of these cases, it seems appropriate for the principal to assess the qualifications of any replacement instructor used. If the replacement does not possess adequate knowledge to continue the class activities as scheduled, alternate activities should be undertaken.

Provision of Adequate Medical Care

In terms of the provision of medical care to those who are injured during physical education class or while participating in athletics, there are two basic obligations: (1) to render emergency first aid assistance until medical personnel arrive, and (2) to exercise reasonable care in procuring medical treatment for the injured party. In view of these obligations, administrators have two primary responsibilities. First, they must be sure that all personnel who have teaching or coaching assignments are competent in the administration of emergency first aid and CPR procedures. It is also incumbent upon the administrator to make sure that those who assist the athletic teams in the capacity of trainer or student trainer are qualified to do so.[51] The failure to do so can be costly as in the case of *Welch v. Dunsmuir Joint Union High School District* in

48. Vargo v. Svitchan, 301 N.W.2d 1 (Mich. Ct. App. 1980).
49. Stehn v. Bernarr MacFadden Foundations, Inc., 434 F.2d 811 (6th Cir. 1970).
50. Brahatcek v. Millard School Dist. No. 17, 273 N.W.2d 680 (Neb. 1979); De Mauro v. Tusculum College, Inc., 603 S.W.2d 115 (Tenn. 1980).
51. O'Brien v. Township High School Dist. No. 214, 392 N.E.2d 615 (Ill. App. Ct. 1979).

which a high school football player with a suspected neck injury became a paraplegic because the coaching staff moved him without using a backboard.[52]

The second responsibility of the administrator in the area of medical care concerns the development of emergency procedures for timely medical assistance and adherence to those procedures. Heatstroke and shock suffered by a high school football player were compounded by the fact that he was not given access to medical treatment for over two hours after his symptoms appeared.[53] A $2.5 million judgment was recently rendered in another case in which a delay in procuring medical assistance for an eleven year old student with a head injury allowed a blood clot to enlarge from the size of a walnut to that of an orange.[54]

Equipment and Facilities

Equipment

In supplying equipment for use in physical education classes and athletics, the school/university has a duty to exercise reasonable care to supply equipment that is in a safe and suitable condition for the intended use. The equipment must be chosen appropriately based on the age and skill level of the participant.

The instructor/coach, based on his expertise in the field, is in the best position to evaluate the type of equipment necessary to protect players from injury and may be held to a higher standard of care in choosing safe equipment. In a Massachusetts case, a prep school ice hockey player suffered a skull fracture as the puck penetrated a gap in his helmet. The Supreme Judicial Court of Massachusetts upheld a finding of negligence on the part of the coach because he should have been aware of the availability of helmets which were of safer construction and recommended that the safer helmets be purchased.[55]

When a reasonable recommendation for equipment is made by a coach/instructor, it is poor practice for the administration to ignore the request. In a Pennsylvania case, a physical educator who supervised an after-school floor hockey league made repeated requests to the school administration to purchase protective equipment, including mouthguards. The requests were denied, the program continued, and, as was foreseeable, one participant suffered the loss of five teeth as he was struck by a stick. A verdict of $83,190 was returned in favor of the injured student. This verdict was affirmed upon appeal.[56] In a similar

52. Welch v. Dunsmuir Joint Union High School Dist., 326 P.2d 633 (Cal. Ct. App. 1958).
53. Mogabgab v. Orleans Parish School Bd., 239 So. 2d 456 (La. Ct. App. 1970).
54. Barth v. Board of Educ., 490 N.E.2d 77 (Ill. App. Ct. 1986).
55. Everett v. Bucky Warren, Inc., 380 N.E.2d 653 (Mass. 1978).
56. Berman v. Philadelphia Bd. of Educ., 456 A.2d 545 (Pa. Super. Ct. 1983).

situation, a failure to provide protective equipment for floor hockey, which was offered as a part of the physical education curriculum, was the basis for an action in negligence in a New Jersey case. The student in this case sustained an eye injury. The Superior Court of New Jersey affirmed a decision on behalf of the student.[57] Although schools/universities operate on a limited budget for equipment, the lesson is clear: if *necessary* protective equipment cannot be afforded, the activity cannot prudently be continued.

Even though an activity may not be offered as a regular part of either the curriculum or the athletic program, protective equipment must be provided for any event sponsored by the school, if the activity entails recognizable hazards to the participants. In an Illinois case, a "powder-puff" football game was held, an annual tradition. The participants were female high school students. Very little instruction was given and *no* equipment was supplied even though the game was played as tackle football. One player was struck in the face by an opponent and suffered a broken nose. She also underwent severe psychological and behavioral changes as a result of this incident. The appeals court found that the school district "had an affirmative duty, where students were engaging in school activities, whether they are extracurricular, or formally authorized as part of the school program, to furnish equipment to prevent serious injuries." The Supreme Court of Illinois subsequently affirmed this decision.[58]

As a part of the duty to supply proper equipment, the equipment given must fit correctly. An Illinois high school football player sustained injury because his helmet was ill-fitting. The Supreme Court of Illinois refused to apply the standard of willful and wanton misconduct which was the applicable standard in matters relating to supervision or instruction by a teacher. Rather, in finding that the furnishing of equipment to students was a separate function, the court held the school district to a duty of ordinary care.[59] In this connection, participants should be given instruction in the proper fit and correct usage of equipment. They should be taught how to inspect their equipment and directed to return equipment which is ill-fitting or unsafe.

Protective equipment must not be removed even if it hinders optimum performance. In a Texas case, the plaintiff, a university football player, wore a supportive leg brace because of a previous injury. The coach directed the trainer to remove the brace because it impaired the player's running ability. Without the brace, the plaintiff sustained a permanent knee injury. The Texas Supreme Court found a breach of

57. Sutphen v. Benthian, 397 A.2d 709 (N.J. Super. Ct. App. Div. 1979).
58. Lynch v. Board of Educ. of Collinsville Community School Dist., 390 N.E.2d 526 (Ill. App. Ct. 1979) *aff'd* 412 N.E.2d 447 (Ill. 1980).
59. Gerrity v. Beatty, 373 N.E.2d 1323 (Ill. 1978).

duty to provide proper equipment.[60]

In conjunction with the "failure to warn" cause of action which was discussed earlier, it is critical that those pieces of equipment which come with warning labels have them affixed in a clearly visible fashion. In yet another case from Illinois, the warning label for a minitramp, which was assembled by a school instructor, was placed on the underside of the trampoline bed. Thus, anyone using it was unable to read the cautionary language prepared by the manufacturer of the equipment. A high school student, a beginning gymnast, was injured as she performed a somersault from the minitramp. The case turned on the failure to warn issue and resulted in a $1.6 million settlement by the school district. The inexperienced student did not fully understand the dangers involved in the use of this equipment due to her inability to read the warning label.[61]

Any equipment which poses a danger to students should be securely stored when not in use. In an Oregon case, students were injured as they bounced on a springboard and hit their heads on a low doorway. After class, the students were asked to put the springboard in a storeroom and were injured in doing so. The Oregon Appeals Court remarked on the lack of instruction regarding the springboard's use as well as the failure to advise the students regarding proper storage of the equipment.[62]

The Colorado Supreme Court found that there was no duty by a university to eliminate the use of an unsafe trampoline which was located outside of a fraternity house. The plaintiff, a member of the fraternity, was rendered a quadriplegic after he used the trampoline. A jury awarded the plaintiff $5,256,000 which was upheld by the appeals court. However, the supreme court reversed this decision on the basis that a holding favorable to the plaintiff would, in effect, make the university an insurer of students' safety. There is no duty to protect a university student, at least in this context, from the "well-known dangers of a trampoline."[63] It is reasonable to surmise that the logic of this case is applicable only to a higher education setting where the students are capable of independent and autonomous action.

Finally, the inspection and maintenance of equipment is a critical responsibility. Although perhaps not often thought of as equipment, synthetic turf is just as much a part of the equipment used as is a helmet, baseball bat, or trampoline. An Illinois appellate court concurred with this reasoning in a case brought after a high school football player sustained injuries allegedly due to an improperly maintained artificial field. The school district has an obligation to furnish safe equipment,

60. Lowe v. Texas Tech Univ., 540 S.W.2d 297 (Tex. 1976).
61. Pell v. Victor J. Andrew High School, 462 N.E.2d 858 (Ill. App. Ct. 1984).
62. Grant v. Lake Oswego School Dist. No. 7, Clackamas County, 515 P.2d 947 (Or. Ct. App. 1973).
63. University of Denver v. Whitlock, 744 P.2d 54 (Colo. 1987) (en banc).

which includes the playing field itself.[64] The obligation to furnish a safe athletic field also entails the obligation to use a qualified installer and to perform regular inspections regarding the shock absorbency characteristics of the synthetic turf. The foregoing reflects the reasoning found in an Oregon case in which a university baseball player died as a result of head injuries suffered when he fell on the artificial turf.[65]

Facilities

In dealing with injuries caused to premises defects or hazards in sport facilities, the courts generally determine the standard of care owed to persons in terms of their legal status as invitees, licensees, or trespassers. The category into which the injured person is placed is often dispositive of the outcome of the case due to differences in the extent of duty required.

An excellent example of this point is found in a case decided by the Supreme Court of Ohio. The injured individual was a minor who accompanied her mother to the defendant university to use its recreational facilities which were open to the public without charge. In the locker-room, the minor pulled some lockers, which were not secured to the wall, over on herself. The decision was favorable to the university because the minor and her mother were held to be licensees rather than invitees. The university, in such a case, was not liable for ordinary negligence. The duty was only to refrain from wantonly or willfully causing injury.[66]

Two New York cases, both decided in 1982, again illustrate that the status of the injured person may be dispositive of the issue of liability. In the first case, a university student, participating in an intramural softball game, was injured as he stepped into a drainage ditch located approximately fifteen feet away from the foul line. The plaintiff was injured as he tried to catch a foul ball. The appeals court found no liability by the university.[67] In contrast to this decision, another New York appeals court found for an intercollegiate softball player who was injured as she slid into a depression in the field near third base which was hidden from view by grass.[68] The difference in outcome in these two cases may be explained by categorizing the intramural participant as a licensee who was on the property solely for his own benefit versus the varsity athlete who may be considered as an invitee since her presence had benefit for the university.

Generally speaking, the duty owed to a trespasser is only to warn the trespasser of any highly dangerous artificial condition which the tres-

64. Thomas v. Chicago Bd. of Educ., 377 N.E.2d 55 (Ill. App. Ct. 1978).
65. Halbrook v. Oregon State Univ., Case No. 16-83-04631 (Or. Cir. Ct. 1983).
66. Light v. Ohio Univ., 502 N.E.2d 611 (Ohio 1986).
67. Scaduto v. State, 446 N.Y.S.2d 529 (App. Div. 1982).
68. Lamphear v. State, 458 N.Y.S.2d 71 (App. Div. 1982).

passer is not likely to discover. However, this duty is broadened considerably if the trespasser is a child. Thus, a property owner must exercise reasonable care to protect children from any attractive nuisance on the property. An attractive nuisance is an artificial condition upon the land to which children are likely to be drawn and which poses an unreasonable risk of serious injury or death. The attractive nuisance doctrine is often used successfully in regard to swimming pools which are inadequately secured or fenced.[69]

The attractive nuisance doctrine is limited to children who are not likely to appreciate the danger because of their tender years. Thus, in an Illinois case, a seventeen year old who climbed a tree next to a school's field house to gain access to the roof was unsuccessful in her claim that the school created an extraordinary risk of harm by trimming the tree. The appeals court found that the plaintiff was capable of understanding the danger involved and the school district owed no duty to her in this case.[70] Furthermore, in a New York case, two adult snowmobilers who were injured as they struck a snow-covered bench on a school's baseball field were denied recovery. Although the school knew that the field was used by the public for snowmobiling, the plaintiffs were not able to establish that the bench was an "inherently dangerous instrumentality" which was or should have been known to the school board. The appeals court granted summary judgment in favor of the school board.[71]

Once it is established, however, that a person should be considered an invitee, the school/university must act as a reasonable and prudent operator to make the facility reasonably safe. This duty entails three obligations: (1) to inspect the facility to discover defects or hidden hazards; (2) to remove or repair defects or warn users of hidden hazards; and (3) to use reasonable precautions to protect users from foreseeable dangers.

In regard to the duty of inspection, it is clear that the courts expect a regular program of preventive maintenance. In a New York case, a missing bolt on a track railing in a gymnasium resulted in a wrongful death verdict in the amount of $1.4 million. The appeals court, in affirming the verdict, stressed that the school district had no preventive maintenance program and failed to regularly inspect the gymnasium.[72]

The responsibility for the condition of the school facilities lies with the administrator responsible for the physical plant on an operational basis. A Michigan case emphasized this point as the appellate court placed responsibility for the use and condition of the school facilities

69. McWilliams v. Guzinski, 237 N.W.2d 437 (Wis. 1976).
70. Newby v. Lake Zurich Community Unit Dist. 95, 482 N.E.2d 1061 (Ill. App. Ct. 1985).
71. Mattison v. Hudson Falls Cent. School Dist., 458 N.Y.S.2d 726 (App. Div. 1983).
72. Woodring v. Board of Educ. of Manhasset Union Free School Dist., 435 N.Y.S.2d 52 (App. Div. 1981).

upon the principal.[73]

As a corollary to the duty of inspection, schools/universities will be held responsible for those defects of which the administration should have been aware if reasonable inspections had been undertaken, even if *actual* knowledge of a defect does not exist. This concept of constructive knowledge was used as a part of the reasoning in two cases. First, in a Louisiana case, an elementary student was injured while playing softball in a physical education class as he tripped over a piece of concrete embedded in the basepath. The school district, in its defense, argued that it had no actual knowledge of the hazard. The appeals court found this argument unpersuasive, however, and held that the school board had constructive knowledge of the hazard. It should have discovered the problem and rectified it before the field was used for play.[74] Also, in a Virginia case, the issue of constructive knowledge was discussed in regard to an outdoor track facility. The plaintiff was injured as he fell on broken glass while running laps on the track. The glass would have been discovered if a periodic inspection of the facility had been undertaken.[75]

Once hazards/defects have been identified, remedial measures must be taken promptly. In a New York case, a university student slipped in a puddle of water in the lockerroom, away from the shower heads. The student had informed the instructor of this hazard on previous occasions. The appeals court found that the university had notice of the condition through its employee and failed to use reasonable care to eliminate the hazard.[76] Moisture on the floor was also the issue in a Louisiana case. A high school basketball player allegedly slipped on the court surface which had been beset by considerable condensation throughout the contest. The floor had been wiped a number of times during the game and this condition necessitated the cancellation of a subsequent game. However, the referees allowed this game to continue. In a rather surprising result, the appellate court ruled in favor of the defendants based on the fact that the referees and coaches, as experts, did not regard the conditions as dangerous.[77]

Problems with bleachers often become the focal point of lawsuits: spectators fall from bleachers; bleachers sometimes collapse during events; and injuries are caused by protruding bleachers. Two illustrations may be found in cases from Texas and Illinois. In Texas, a spectator at a school basketball game was injured when the bleachers collapsed. The appeals court upheld immunity for the school district since it viewed the game to be a governmental function.[78] An Illinois case dealt

73. Cook v. Bennett, 288 N.W.2d 609 (Mich. Ct. App. 1979).
74. Ardoin v. Evangeline Parish School Bd., 376 So. 2d 372 (La. Ct. App. 1979).
75. Short v. Griffitts, 255 S.E.2d 479 (Va. 1979).
76. Van Stry v. State, 479 N.Y.S.2d 258 (App. Div. 1984).
77. Nunez v. Isidore Newman High School, 306 So. 2d 457 (La. Ct. App. 1975).
78. Gravely v. Lewisville Indep. School Dist., 701 S.W.2d 956 (Tex. Ct. App. 1986).

with an injury suffered by a student who ran into a row of bleachers which protruded into the area in which the class was playing wiffleball. The action against the school district was brought for failure to use reasonable care in providing safe facilities. The Illinois appellate court found for the school district since the student was not able to meet the requisite standard of willful and wanton neglect under Illinois statutes.[79]

Finally, cases dealing with the installation of safety glass illustrate the concept of using reasonable precautions to protect participants from foreseeable dangers. In particular, there are three cases which point to the advisability of replacing nonsafety glass in doors and windows which are accessible to students as they engage in activity. First, in a New York case, a college student was engaged in an ultimate frisbee game in a university gymnasium. As the plaintiff looked back over his shoulder to catch a frisbee, he crashed through a glass window in a door, severely injuring his arm. The jury found that the glass doors were a dangerous condition. The appeals court affirmed the verdict for the plaintiff.[80] Secondly, a Louisiana court reached a similar finding. During a physical education class, several students went to the lobby to get a drink of water. Horseplay ensued and one student was injured as he fell through nonsafety glass in a doorway. The Supreme Court of Louisiana affirmed the negligence of the school board in failing to use safety glass in the lobby area.[81] The third case, from Massachusetts, also found for a student who was injured as his hand went through the glass panel in the auditorium door. According to the Appeals Court in Massachusetts, the defendant school board should have replaced the dangerous glass with safety glass.[82]

Risk Management

Expert commentary regarding the liability insurance crisis has focused on three primary factors which have prompted educators to adopt a risk management perspective in regard to their physical education and athletic programs. First, the American public has assumed a litigious posture relative to athletic and recreational injuries. The climate is extremely litigation oriented and the search is intense for a "deep pocket" to cover the costs of injury, regardless of fault.

The second reason often cited concerns the judicial attitude toward liability in sports and recreational activities. Each year, over seventeen million people are injured while participating in sports and recreational activities. The trend is toward the expansion of liability for those who administer, instruct, coach, train, or officiate in recreational/athletic

79. Tijerina v. Evans, 501 N.E.2d 995 (Ill. App. Ct. 1986).
80. Eddy v. Syracuse Univ., 433 N.Y.S.2d 923 (App. Div. 1980).
81. Wilkinson v. Hartford Accident and Indemnity Co., 411 So. 2d 22 (La. 1982).
82. Johnson v. City of Boston, 490 N.E.2d 1204 (Mass. Ct. App. 1986).

settings. The usual defense in athletic settings (i.e., the doctrine of assumption of risk) has been severely eroded by judicial interpretation over the past decade.

A third factor is the trend toward abrogation of governmental immunity. In most states, school districts and state universities may now be sued, at least to some degree. All three of the foregoing factors are compelling reasons to institute risk management programs in the physical education/athletic setting. All of the foregoing are substantial business reasons for recognizing the role risk management programs can address.

However, it is my position that the strongest argument for risk management stems from a concern for the safety and welfare of the participants, the *raison d'etre* for any physical education/athletic program. Regardless of the economic factors, a risk management approach should be implemented because it is a preventive method to help reduce the risk of injury to participants, wherever possible.

The cornerstone of any risk management program is a preventive mentality. In short, risk management is concerned with identifying, evaluating, and controlling losses in the environment. Its focus is on potential losses which are financial in nature as well as those losses which stem from personal injury.

Because of the concern with personal injury in any environment which focuses on physical activity, the full scope of the risk management program is often overlooked. Generally risk management programs are implemented to control losses arising from personal injury with little attention given to the control of financial losses stemming from property damage and business operations. It is suggested that a comprehensive approach be taken with the inclusion of all sources of risk in the risk management program including contractual liability and exposure due to possible constitutional law violations. Because of space limitations, however, this chapter will focus on personal injury losses which may arise due to negligence.

The process of developing a risk management program consists of three steps: (1) the identification of all risks; (2) evaluation of the risks, and (3) control of the risks.[83]

Identification of Risks

The identification of all risks in the environment is the initial step in the risk management program. For example, in our situation, personal injury losses which may arise due to negligence in the management/operation of the physical education/athletic programs must be identified.[84]

The three areas which pose particular risks for physical education/

83. Clement, Preventative law: The risk management audit. *Future Focus* (Fall, 1986).

84. Van der Smissen, The insurance crisis — risk management, an approach. *Proceedings of the Great Lakes Training Institute* (1986).

athletic programs are: (1) supervision; (2) conduct of the activity; and (3) environmental conditions. Each of these areas has been addressed with reference to the types of allegations of negligence which are often raised in a physical education/athletic environment. A thorough review of these potentially troublesome areas should be undertaken in order to identify all possible risks.

Evaluation of Risks

The second aspect of the risk management program consists of the evaluation of the risks which have been identified. It is at this point that one assesses the magnitude of possible exposure to loss in terms of degree of severity and frequency of risk exposure. This assessment should provide the knowledge to target certain programs/operational areas as particularly vulnerable to loss.

Once areas of concern have been targeted, a balancing process by administrators must take place. The value of the conceivably "risky" activity to the program and the students/athletes must be weighed against the magnitude of exposure to loss. If the program/activity is deemed valuable enough to exist, one needs to search for ways to reduce the riskiness of the endeavor. What safeguards can be implemented to reduce the risk of loss?

Control of Risks

Finally, control is the third element of a risk management program. The procurement of insurance is one form of risk control in which the financial risk is transferred to another entity. This approach, however, does not, by itself, reduce the likelihood of loss.[85]

Of greater interest to the substance of this discussion is risk control through operational management in which an attempt is made to reduce the frequency and severity of losses. No risk manager can hope to eliminate *all* risk; it is the nature of physical activity that some risk will always exist. However, it is possible to eliminate risks which exist due to poor program planning, failure of supervision, improper instruction, or unsafe facilities or equipment.

An important step toward the control of risks is the establishment of a safety committee. This committee should be composed of representative personnel from all areas of the program including administrators, teachers, coaches, maintenance personnel, business managers, and trainers. One of the committee members should be given the responsibility of functioning as a safety officer.

The safety committee is charged with the responsibility of developing policies and procedures which comprehensively address the entire physical education/athletic program. The three areas of concern previously addressed should be given careful consideration. Plans of supervision

85. *Id.*

should be drafted. Lesson plans and curriculum guides have an important function in documenting the competency of instruction. Inspection of equipment and facilities should be undertaken on a regular basis.

Forms should be developed which monitor critical areas of the program, including the medical status of athletes, participation agreements, detailed instructions regarding the use of equipment and facilities, emergency medical procedures, and accident reports. Adequate warning signs should be displayed in activity areas which carry special risks to participants.

Finally, in-service workshops should be developed for personnel to insure that they have an awareness of the risk management program and the ability to implement their own safety audits in their areas of responsibility. The preventive mentality is critical to a risk management program which succeeds at all levels of operation.

Waivers

Before closing this chapter, a discussion of the role of waivers in the athletic program is necessary. It is being discussed in conjunction with risk management because some people have the mistaken notion that a waiver of liability is a substitute for the effective management of one's athletic program. This notion is not only erroneous, it is indicative of a dangerous mentality.

On the other hand, some people believe that waivers should never be used because they are not worth the paper they are written on. This notion is also equally erroneous and can prove a disservice to the operation of an athletic program.

There are competing considerations in the law which surround waivers and thus add to the confusion in determining their usefulness. Tort law is premised on the philosophy that persons who negligently cause injury to another party should be responsible to that party in the form of damages. Contract law, however, is based on the philosophy that parties should be free to make their own agreements. Thus, exculpatory agreements which attempt to relieve a party from responsibility for his own negligence are caught in the crossfire between these two competing philosophies. Much of the discussion in a case regarding waivers can often be better understood if one bears this tension in mind.

As a general rule, waivers/releases of ordinary negligence will be upheld unless they: (1) frustrate public policy or (2) allow a party which is unfairly dominant in the bargaining process to be released from its own negligence. Assuming neither of the above situations exists, the waiver language must be drawn carefully so that a court will give it effect. The waiver must: (1) have conspicuous terms, (2) stem from an open and free bargaining process, (3) be clear, detailed, and specific, and (4) attempt only a release of liability for negligent acts (it will not be upheld to release a party from liability for an intentional tort). Also, the parties must be competent to enter into such an agreement. It is on this last

point that there is difficulty with a waiver in a school setting because minors may repudiate an otherwise valid contract.

In connection with waivers in a school setting, there is a recent case, *Wagenblast v. Odessa School District*. In this situation, the school district required students and their parents to sign a release of all potential future claims against the district as a condition to student participation in interscholastic athletics. The Washington Supreme Court held the release invalid as a violation of public policy. A party which performs a service of great importance to the public and has a decisive bargaining advantage violates public policy by requiring the releases to be signed as a condition of participation in athletics.[86] The court did not address the question of the nonwaiver language (i.e., that language which simply informed participants about the inherent risks of activities).

What should this decision say to school administrators regarding the use of waiver forms for their athletic programs? In my opinion, this decision should have little impact on a school district's use of waivers for two reasons. First, regardless of the court's strong language regarding the policy issues which are offended by a waiver, the reality of the situation is that the "release" language is worthless since we are dealing with minors who can repudiate their waivers. Furthermore, parents' signatures are also worthless to waive the rights of their children. Therefore, the point on which the court took a hard stand is a meaningless one because school districts are not relying on the release language to be effective when they are dealing with a population of minors. Second, the court did not address the question of the other language which is in the waiver document having to do with an understanding of the inherent risks of an activity. The court, in no way, invalidated the usefulness of this language. This is important because the warning of inherent risks is a critical factor as we have previously discussed in connection with the *Thompson* decision.

Therefore, although the "traditional" exculpatory clause has little effect in the school setting, the release/waiver document has more to commend its use than the exculpatory aspect. The use of specific language which warns participants of inherent risks in an activity is a very important aspect of this document, one which should help forestall a plaintiff's allegations of "failure to warn."

In the collegiate setting, there are, of course, different considerations. For the most part, the students at the university level are adults who are competent to release their rights. The public policy issues raised by the *Wagenblast* court should not be so compelling when dealing with collegiate athletics. Therefore, administrators at this level should be able to benefit from the exculpatory aspects of the document as well as the warning language. The waiver language should be drafted carefully, however, with close attention to making the terms conspicuous, clear, detailed, and specific.

86. Wagenblast v. Odessa School Dist. No. 105-157-166J, 758 P.2d 968 (Wash. 1988).

3

Contracts for Sport Administrators

Contract Preliminaries

Although there is a great deal of information provided to sport administrators regarding the topics of negligence, risk management, and constitutional law, there is a noticeable lack of attention to the issues of contract law. This is a particularly troublesome oversight since sport administrators deal with contractual issues on a constant basis. This chapter is an attempt to address that deficiency, in part.

Many sport administrators are well aware of the possible ramifications of operating a program without adequate supervision or competent instruction. However, the consequences of entering into contracts without a complete understanding of their provisions may be just as costly. A preventive approach must be undertaken in order to assure that the documents used by the sport administrator protect the institution's interests. Since contracts are usually negotiated for a lengthy period of time before they are executed, there is sufficient time to implement a preventive program.

Critical areas of concern for sport administrators will be addressed including: (1) lease agreements; (2) agreements with concessionaires and other vendors; (3) the athletic grant-in-aid; (4) contracts with officials and team physicians; and (5) employment contracts. All of these matters must be dealt with on a regular basis by athletic administrators. If approached with foresight and planning, contract matters can be an important part of a loss control program.

Some general contract principles will be discussed. Then, the substantive areas mentioned above will be presented in conjunction with a hypothetical case study of a college athletic director.

Elements of a Contract

A contract may be defined as a promise, or a set of promises, for breach of which the law gives a remedy. The three elements of every contract are: (1) offer, (2) acceptance, and (3) consideration. An offer may be considered as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited."[87] Within this definition lies the implication that an offer contains a *present* contractual intent and sets forth

87. Restatement (Second) of Contracts (1981).

the terms of the offer with certainty. In its simplest sense, an acceptance is an unequivocal and unconditional assent to the offer. It is, of course, not uncommon for several exchanges of offers and counteroffers to be made before parties reach the stage of mutual assent. Consideration, although often thought of as simply the exchange of money for goods or services rendered, need not involve money at all. Rather, consideration simply means that there is a bargained for exchange. It need not involve monetary exchange although it often does. In the absence of duress, fraud, or a great disparity in bargaining power, the courts will not inquire as to the adequacy of consideration. People are generally free to make their own business deals, however poor or advantageous they may be. If the three elements of offer, acceptance, and consideration exist, then a contract has been formed.

The title of a document is not controlling; therefore, administrators should not be misled into thinking that because a document is not titled as a "contract" it will not have binding contractual force upon the parties. It is a common saying among lawyers that if you don't want someone to sign something call it a contract. If you do want to have someone sign it, call it an agreement. However, the title of the document is not determinative of the issue of whether it is indeed a contract. If all the necessary elements co-exist, it is a contract regardless of what the title might disclose.

Another premise of contract law which is crucial for administrators to understand is the *parol evidence rule*. This rule states that when two parties have made a contract and have expressed it in writing to which they both have assented as the complete and accurate integration of their contract, oral and/or written evidence of antecedent understandings and negotiations will not be admissible for the purpose of varying, altering, or contradicting the writing. The gist of this rule suggests that if there is a provision which you deem to be an important part of your dealings, make sure that this provision is included in the final version of the contract which you execute. If this provision is not included at that time you will not be able to prove that this matter should have been included in the contract because the parol evidence rule presumes that the final writing which you signed carries out the intentions of the parties in all respects. For example, you have negotiated with another school to have that school play a volleyball match at your school in the upcoming season. During the preliminary negotiations, there was discussion about your school returning the match to their school the following year. In the final contract there is no mention of this return match. The parol evidence rule would bar the admission of any evidence regarding these oral negotiations since the signed contract is presumed to evidence the complete understandings of the parties.

Form Contracts

Although the use of form contracts is a common aspect of business, they must be used wisely to maximize their benefit to your institution. Form contracts are often of great assistance to address issues which frequently recur in an administrative setting. However, there are a few caveats which accompany the use of these forms. First, the form itself should be drafted with the assistance of an attorney who fully understands what you are trying to accomplish in a particular situation. All contracts should be drafted with the "worst case" scenario in mind. Many contracts can be adequate when the relationship between the parties continues to be amicable; it is the test of a good contract to be able to provide guidance to the parties if the working relationship becomes troubled. It must be understood that if a contract matter ends up in litigation, any ambiguities in a contract will be resolved against the party which drafted the document. It is important, therefore, that time be taken to assure that the form contract accomplishes what it should.

Since a form contract is drafted with a particular situation in mind, the use of the contract should be limited to those situations. In other words, the document should not be used in situations which strain the meaning and/or usefulness of the document. "Minor" adjustments of a form should not be undertaken lightly. Contracts are viewed as integrated wholes and the deletion/alteration of one clause may have unexpected results upon the document as a whole.

Finally, form contracts should be periodically reviewed as a part of your risk management program to ascertain whether they are still adequately serving the need for which they were drafted. Files should be purged of old form contracts which have outlived their usefulness to avoid the possibility of anyone using the antiquated document for a current transaction.

Authority to Contract

Generally in every organization each administrative position carries with it the authority to engage in certain business transactions on behalf of the institution. Each employee should be cognizant of the policies/procedures which set forth his contractual authority and, in an ideal world, all employees would adhere faithfully to those limitations.

Since we do not exist in an ideal world, the administrator may be faced with the prospect of dealing with the issue of contractual liability based on an unauthorized transaction conducted by an employee. Therefore, it is important to understand the general principles by which courts ascertain whether institutions should be bound by contracts made by employees who exceeded their "actual" authority to contract. First, if the third party should have known, or actually knew, that the employee exceeded his authority in contracting, then the employer is not bound by the contract. For example, the business manager of a college

athletic department signs a multi-million dollar contract for the construction of a new arena. In this situation it is clear that the third party should have known that no business manager is ever empowered to sign a contract of such magnitude. Therefore, the college would be able to disavow the contract. However, if the transaction was of a type which is customarily handled by a business manager (e.g., a contract to purchase sporting equipment in the amount of $5,000), the vendor has a right to rely upon the business manager's "apparent" authority to contract in this situation even though the institution may have a policy which forbids the business manager to enter into a purchase contract which exceeds $3,500. If the vendor has no actual knowledge of these limitations, and it is reasonable based on business custom to believe that the employee has the requisite authority, an institution may be bound by its employee's contract even if he violated the bounds of his actual authority. To prevent the problem of "apparent" authority being used to the detriment of the institution, it is recommended that athletic administrators provide vendors, and other third parties with whom they have contractual dealings, information regarding the limits of contractual authority possessed by members of the athletic department.

Substantive Contract Issues

A Day in the Life of Bobby "Boom Boom" Baker — Athletic Director at Sports R Us University.

Monday, 8:15 a.m.

After a relatively restful weekend (i.e., no home events to attend), Boom Boom is ready for a calm Monday morning. However, as he enters his office, his secretary thrusts a phone message into his hand. The message urged him to contact the facility manager as quickly as possible.

As Boom Boom dialed the number, he wondered what the problem was — probably another water leak. However, the facility manager advised Boom Boom that an accident had occurred in the gym on Sunday during the time it had been leased to the local YMCA for a dance performance. During rehearsal, a University employee injured one of the performers by raising a stage lift on which she was standing. Now the injured party was intent on suing the University.

Boom Boom's heart began to pound as he hung up the phone. He vaguely remembered a lease agreement with the YMCA but couldn't recall where he had filed it. He asked his secretary to search for the document.

Lease Agreements

In these uncertain financial times, it is becoming increasingly common for institutions to lease their athletic facilities to third parties for rental fees. In this situation, it is imperative that Boom Boom find the controlling provisions of the lease to ascertain whether liability can be

asserted against the University. Absent any lease provisions to the contrary, the general rule of law would be that the University would be responsible for the negligent acts of its employee (e.g., the negligent raising of the stage lift), by virtue of the doctrine of respondeat superior.

However, once Boom Boom located the pertinent document it had language in it which changed the complexion of this matter into a favorable one for the University. An indemnification clause had been inserted into the lease. *Indemnification* is a method to protect an entity from financial loss in the event of a judgment against it. The indemnification agreement comes into play after an award has been made. Thus, in this case[88] an indemnification clause had been drafted which clearly indicated the University's intent to be indemnified for *any* injury, regardless who was negligent. The pertinent language was as follows: "And to indemnify and save harmless the University against any and all claims for loss, injury, or damage to persons or property including claims of employees of Permittee (YMCA) or any contractor or subcontractor, arising out of the activities conducted by the Permittee, its agents, members, or guests."[89]

The indemnification clause was sufficient to protect the University's interests even though the alleged negligence was by a University employee. The language was clear and unambiguous that the University was indemnified against liability arising from *any* source during the time the YMCA was in control of the auditorium. Further evidence of the intent of the clause may be found in the fact that the lease required the YMCA to procure liability insurance. The purpose of this insurance provision was to protect the University from the consequences of its own negligent acts.

Therefore, in any lease transaction it is critical for the lessor institution to have an indemnification clause, broadly written as above, which will inure to its benefit in the event of property damage or personal injury. Furthermore, the lessee should provide a certificate of insurance proving that liability insurance has been procured in an amount satisfactory to the lessor. It is also preferable that the lessor be named as an additional insured on the lessee's insurance policy.

Finally, the lease agreement should make clear that the relationship between the parties is simply one of lessor/lessee and that the lessee is not to be considered to be the partner, associate, or joint venturer of the lessor. This is an important matter because of the implications of partnership. In a partnership or joint venture, the negligence of one partner/venturer is imputed to the other partners/venturers. To avoid this unwelcome construction of the document, a clause specifying that the only relationship that exists between the parties is one of lessor/lessee should be inserted.

88. Bridston v. Dover Corp., 352 N.W.2d 194 (N.D. 1984).
89. *Id.*

Monday, 9:00 a.m.

On the other end of the phone was Pop Johnson who wanted to serve as the concessionaire for the athletic events held at the baseball stadium. Pop, an old friend of Boom Boom's, was trying to recover financially after a few business ventures failed. Boom Boom gives him tentative approval on the phone but tells Pop to submit a written proposal to him.

Contracts with Concessionaires

Did Boom Boom act without sufficient foresight when he tentatively agreed to allow Pop Johnson to be the concessionaire at the stadium? The answer is probably in the affirmative since it seems that Pop Johnson is an unwise choice because of his financial instability. Aside from the legal issues in a transaction of this nature, consideration must be given to whether this person has the necessary business qualifications to serve as a concessionaire for the institution. In this regard an administrator would need to address the following issues. First, is the candidate financially stable? This is important because it is not easy to replace a concessionaire mid-season if he is not able to fulfill his contractual obligation. Second, will the merchandise provided be of good quality? Third, will he provide service which is in keeping with the image of the institution (e.g., a clean operation with great attention to the customer)? All of the foregoing, at a minimum, need to be addressed before an agreement is negotiated.

Once a party meets the institution's standards, the agreement should be structured so that the vendor is an independent contractor and not an employee of the institution. An indemnification clause, as discussed above, is also a necessity. The concessionaire must be able to provide liability insurance in an appropriate amount and the institution should be named as an additional insured.

Monday, 10:00 a.m.

Boom Boom's first appointment of the day arrives. Boom Boom expected to meet only with Jerry Jock, a former football player whose financial aid was not renewed for his senior year. Jerry had been a scholarship athlete for the previous three years but Coach Hardnose had decided not to award Jerry a scholarship for his senior year on the basis that Jerry was not contributing enough to a winning effort. In Jerry's wake, however, was a man in a three piece suit whom Jerry introduced as his attorney.

As Boom Boom surreptitiously slipped an antacid tablet into his mouth, the meeting began. Boom Boom felt confident as he pulled out a copy of the university form used for athletic financial aid awards — it very clearly stated that "the maximum length of any grant-in-aid to a student-athlete is for a period of one academic year." According to the document's language, no reason was needed by Coach Hardnose to refuse to renew Jock's grant-in-aid for the upcoming year. Notification

of the nonrenewal had been given as required by NCAA regulations. Boom Boom sat back with a smug look on his face.

Jock's lawyer then advised Boom Boom that they were not raising any issue regarding the document language itself. Rather, they were proceeding based on a verbal assurance which the University had given at the time Jock was recruited. At that time, as assistant coach had told Jerry that, although the language of the grant-in-aid form referred to one year grants, Jerry would be given aid for all his years at the University, provided he met all academic requirements. Jerry had signed with the University in reliance upon that representation. Additionally, it was clearly the practice of this University that athletes, once signed to a grant-in-aid, were granted automatic renewals of the aid from year to year. It was an expectation held by all University scholarship athletes.

Athletic Grant-in-aid

Before dealing with Jerry Jock's complaint, it may be helpful to review the law regarding the athletic grant-in-aid. Some courts have analyzed the athletic scholarship as a contract between the student-athlete and the university.[90] Under this rationale, the university's extension of the scholarship is an "offer." By choosing to attend this institution the athlete "accepts" the offer. Consideration consists of the scholarship grant by the university and the participation in athletics by the student. In short, the university allows the athlete access to its educational resources while the student-athlete agrees to maintain athletic eligibility.

There are some difficulties, however, with characterizing the athletic grant-in-aid as a contract.[91] First, compensation flowing from the above "contract" could be theoretically construed as a violation of the NCAA rules regarding amateur status. Second, income derived from this type of arrangement can be considered taxable. Third, this construction may have ramifications regarding whether an athlete should be considered an employee for the purposes of workers' compensation. To date, case law consistently supports the proposition that an athlete is not an employee of the institution.[92] However, if the "contract" rationale gains more support, this could alter the court's analyses of workers' compensation cases.

One legal analyst of these issues has suggested that specific language appear in the grant-in-aid form to negate any suggestion that the document be construed as a contract. This language affirms the scholarship as an educational grant and states that the relationship of the institution

90. Taylor v. Wake Forest Univ., 191 S.E.2d 379 (N.C. Ct. App. 1972); Begley v. Corporation of Mercer Univ., 367 F. Supp. 908 (E.D. Tenn. 1973).

91. Stotlar, "The College Participant: Student Athlete or Paid Professional?," in *Sports and Law* (H. Appenzeller ed. 1985).

92. Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170 (Ind. 1983); Coleman v. Western Michigan Univ., 336 N.W.2d 224 (Mich. Ct. App. 1983).

to the athlete is not one of employment.[93]

In the Jock scenario, however, another legal point is being argued. This athlete is not arguing about the language of the grant-in-aid document. Rather, Jock is arguing that based on the statements made to him at the time he was recruited, he was entitled to rely upon the fact that the institution would provide him with scholarship aid for the entire time he was at this university. In reliance upon that representation, Jock chose to attend this particular university. Therefore, his decision to attend this institution of higher learning was based upon this statement.

The argument made here is based on the doctrine of *promissory estoppel* or reliance. Justifiable reliance upon a promise establishes a distinct or additional basis for creating contractual rights or duties.[94] This is an equitable argument and the courts will use the doctrine to remedy an apparent injustice if there is a great disparity in bargaining power between the parties. In this case, the argument based on promissory estoppel has viability because the athlete can be characterized as an unsophisticated young person who was clearly mismatched in the bargaining process with a representative of a powerful institution (i.e., the assistant coach who made the representations in question). A further argument on behalf of the athlete would arise from the fact that the renewal of the scholarship had become an implied part of the student-athlete relationship at this university since all athletes had their scholarships renewed as a matter of course.

It is a fact of life that coaches sometimes act in the manner set forth in this scenario, regardless of the language in the grant-in-aid. How can these types of situations by addressed? First, athletic administrators must enforce the policy that coaches are never to promise prospective athletes anything but one year scholarships. Obviously, athletic directors cannot personally attend recruiting talks; however, coaches should know that a violation of this policy is a serious matter. Second, all potential athletes should be advised, upon signing a grant-in-aid, that the period of the award is one academic year only and that the renewal of the scholarship is at the discretion of the institution.

Monday, 12:30 p.m.

Boom Boom decides to go through his mail. Finally, there are some items he can handle without trauma. He signs some game contracts for the upcoming basketball season. Next, he reviews a contract made with a hotel for food and beverage service for the basketball team on the road. Boom Boom is not too attentive and doesn't like to read the small print because he has to put on his spectacles.

The next item is a letter from Joe Whistlehappy, the official who refereed the women's basketball game last Wednesday. It seems that Joe hurt his knee during the contest and is now advising Boom Boom of his

93. Stotlar, *supra*.

94. Restatement (Second) of Contracts 90 (1981).

intention to file a workers' compensation claim. Boom Boom is outraged at Joe's gall. After all, he's not an employee — is he? By this time, Boom Boom is ready for a vacation.

Game Contracts

The game contract is a pivotal document in any athletic program. It is the cornerstone in scheduling contests. As a form contract, it should be prepared with care. The following matters should be addressed in the contract. First, the location, date, and time of the game should be stated. Second, the provision and payment of officials should be addressed. Third, the eligibility and competition rules which govern the contest should be set forth. Fourth, the matter of television and radio rights should be discussed. Fifth, the issue of the availability of complimentary tickets for the visiting institution should be mentioned. Sixth, termination provisions should be incorporated into the agreement. Generally, teams may cancel the contract by mutual consent. However, the issue of a breach by one party must be addressed. This may be done by inserting a liquidated damages clause into the agreement. Courts will not enforce penalty clauses. Therefore, a *liquidated damages* clause is structured in which a breaching party pays an amount which bears a reasonable relationship to the amount of loss which the nonbreaching party will sustain in the event of a breach. This type of clause should be well-constructed so that it is not construed by a court to be merely a punishment for breach (i.e., a penalty clause). Finally, a clause should be drafted which provides that this agreement is the entire understanding of the parties relative to this matter. All of the foregoing are important matters to be considered in any game contract.

Vendor Contracts

In the Boom Boom scenario, he is reviewing, however superficially, a contract for food and beverage service at a hotel. In order to give a vendor contract the type of comprehensive review it deserves, Boom Boom should address the following concerns. First, make sure that the quantity and quality of service (merchandise) to be provided are in accordance with your needs. Be cognizant of clauses which allow a vendor to make "reasonable substitutions" of goods or services. Although a covenant of fair dealing is implied in any contractual undertaking, there still may be variation on what the parties may view as reasonable substitution. For example, in this situation, it may be very important for the training table of the athletes to be made *exactly* as ordered. Therefore, what is reasonable substitution for an anniversary party or other social gathering may not be appropriate for a group of elite athletes. This matter should be addressed in negotiations. This type of concern may also be pertinent in equipment contracts.

Clauses which deal with the terms of delivery and payment are also

important. Discounts for early payment of invoices may be a factor. Also, the time limits for the return of merchandise should be recognized as well as the specific guarantees which accompany the merchandise. In the hotel contract under discussion, prices are subject to increase if the cost of food or beverage rises or if any other operational expenses increase. It is common for vendors to attempt to pass along this type of price increase to customers but it certainly can play havoc with the ability to meet one's budget. Therefore, it is certainly wise to negotiate a limit upon the vendor's ability to pass along costs of this nature. This may be accomplished by setting a cap on increases which will be paid for by the purchaser.

Termination and cancellation provisions should be understood completely. These provisions are often neglected because parties presume that their relationship will always proceed in an amicable fashion. Unfortunately, this is often not the case and parties are faced with unsatisfactory contractual provisions. Parties should clearly understand under what conditions a contract may be terminated and what the notice requirements are to do. Notice requirements should be followed exactly in order to have the desired effect. If no specific procedure for giving notice is set forth in the contract, parties should use a method which best enables that party to prove that notice has indeed been given, in the event that the matter becomes an issue of contention.

Options for renewal are important contractual provisions. A reminder system should be instituted in one's calendar so that renewal dates are not inadvertently missed. It is very disconcerting to have negotiated a favorable renewal provision in a contract only to lose the benefit of that clause by failing to renew in a timely manner.

Game Officials as Employees

The majority position of courts clearly is in opposition to game officials who argue that they should be considered as employees of the school district or university.[95] Therefore, Joe Whistlehappy's claim in this situation will most likely fail. However, it is important that administrators who hire game officials insure that this result is reached by using contracts which state that the relationship of the official to the institution is one of independent contractor.

Although case law supports the proposition that the game official is considered as an independent contractor in most situations, administrators should understand the criteria underlying the distinction between "employee" and "independent contractor" because there will be contracts with other parties whom administrators wish to characterize as being independent contractors (e.g., the team physician and concessionaires). The controlling factor in this determination is the extent of control which the employer possesses. If the employer retains the control to direct another party both as to what shall be done and how the matter

95. Ehehalt v. Livingston Bd. of Educ., 371 A.2d 752 (N.J. Super. Ct. App. Div. 1977).

shall be done, this is strong evidence that an employer-employee relationship exists. Although the employer may permit considerable discretion and freedom of action, the issue is whether the employer has the legal right to control both the method and the result of the services. If this type of control is vested in the employer, regardless of the degree to which the employer actually chooses to use this power, the court will generally view the matter as an employer-employee relationship. However, if the employer contracts only for a certain result and does not retain control over the method by which the result is reached, this is strong evidence that the parties have intended an independent contractor relationship.

Although the courts will look at the language of the agreement to determine the intent of the parties, the description of the relationship will not be sufficient to establish an independent contractor relationship, if the actions of the parties are to the contrary. In addition to the critical factor of control, there are some other factors which the courts look at in making a determination regarding the existence of the independent contractor relationship. First, is the "employee" engaged in a distinct occupation or business? If the person is doing work which is traditionally considered an independent trade, this is evidence of an independent contractor situation. Second, is it customary to treat persons engaged in this occupation as independent contractors? Third, what skills are required to perform the service? Highly skilled persons are more likely to be considered independent contractors. Fourth, who provides the tools and supplies to perform the job? Independent contractors usually have their own equipment to perform the work. Fifth, what is the length of the employment period? Someone who is employed until the completion of a specific task and is compensated upon the completion of a project is more likely to be considered as an independent contractor than one who is hired for an indefinite period of time and paid by the hour, day, or week. Finally, the intent of the parties will be explored primarily in terms of the way the relationship has been structured in the parties' contract.[96]

The above factors may be illustrated by an athletic department's agreement with a doctor to serve as team physician. First, in regard to the issue of control, it is clear that the institution should only attempt to retain control over the result of the agreement (i.e., that the physician will be available to provide medical services to the team on certain specific game days and practices). It would not be appropriate for the institution to attempt any control over the method in which the physician would render services. In reference to the other criteria mentioned above: (1) the physician is engaged in a distinct occupation; (2) it is the custom that team physicians are considered to be independent contractors; (3) medicine is a highly skilled profession; (4) the "tools of the

96. A. Clement, *Law in Sport and Physical Activity* at 96-98 (1988).

trade" belong to the physician; (5) his term of employment is the academic year or specific sport seasons; (6) the physician should be paid in a lump sum for services rendered or to be rendered; and (7) the intent of the parties should be indicated by language in the agreement that states that the "physician is an independent contractor with regard to all consulting services to be rendered hereunder."

The foregoing criteria should be considered anytime an independent contractor relationship is to be structured. The behavior of the parties must be consistent with the characterization of the relationship as stated in the agreement. The employer-employee relationship carries with it the spectre of respondeat superior as well as liability for workers' compensation. These results can be avoided by the proper use of the independent contractor relationship. One caveat should be mentioned, however. Independent contractors must still be chosen with care. Although the matter of liability due to respondeat superior may be negated by the use of the independent contractor, an administrator may still be found negligent if he has not acted as a reasonably prudent professional in choosing an independent contractor who is qualified to serve in that capacity.

Monday, 2:30 p.m.

Boom Boom's final meeting of the day is approaching. He is to meet with the former men's basketball coach to discuss the buy-out of his contract. The decision has been made to terminate Stony Ridge's contract even though he has two years remaining in the contract period. In an effort to settle the matter amicably, Boom Boom is prepared to offer Stony his remaining two years' salary.

Stony, however, will not accept just the two years' salary. In addition, he wants to receive the value of the perquisites which accompanied the contract, thus, almost doubling the amount of the proposed payout. Some of the perquisites included life insurance, two cars, meals, association dues, income from his radio and television shows, income from his basketball camp, and money received for speaking engagements.

As Stony continued, Boom Boom wished that he was back coaching football. The meeting ended without resolution and Boom Boom immediately left the office, went home, and began perusing the want ads in the *NCAA News*.

Employment Contracts — Collegiate Athletics

It is a fact of life, particularly at the level of Division I athletics, that the turnover among coaches is amazingly high. In this situation, we have a breach of the employment agreement by the university. Boom Boom's efforts to settle the matter by offering Stony Ridge his salary for the remaining years of the contract period were to no avail. This is to be expected because in many situations the compensation attributable to the coach's salary is only a fraction of the entire financial package which

flows to a coach from other sources which are directly attributable to his coaching position. The value of these "perks" may often be in excess of the coach's salary. Personal services contracts with shoe companies may, for the very elite in college coaching, exceed $100,000 per year.

One case which illustrates this concept is the matter of Pepper Rodgers who was fired from his position as head football coach at Georgia Tech with two years remaining on his contract. Although Georgia Tech paid his salary for those two years, Rodgers sued for the value of benefits and perquisites which were received from the Georgia Tech Athletic Association and from other sources by virtue of his coaching position. The Georgia Court of Appeals found for Rodgers in regard to some of the alleged "perquisites."[97] This decision should certainly be a cause for concern among athletic administrators.

In view of the Rodgers' case and others with similar claims, it would be wise for administrators to try and address this issue at the time an employment contract is negotiated, not at the time of termination. There should be an attempt to limit the damages which a coach can recover in the event of breach by the employing institution. Language which tries to limit the amount of any "perquisites" recoverable is highly recommended.

It is not only the institution which may breach employment contracts. It is also increasingly prevalent for coaches to breach their agreements. There is, of course, nothing to prevent an athletic administrator from negotiating a clause which attempts to provide for this contingency. Therefore, a clause which provides that the coach who breaches the agreement is liable to the institution for liquidated damages is certainly permissible. This has been done in a recent case.[98] However, there are two caveats with this strategy. First, the institution should consider whether a clause of this nature will enhance its reputation among coaches. Institutions which seem to penalize coaches who wish to advance in their coaching careers may suffer a public relations problem in attracting new coaches. Second, the real legal difficulty is in drafting a liquidated damages clause which will withstand scrutiny. The clause cannot be written as a mere penalty or it will not be upheld. However, a liquidated damages clause must have a reasonable relationship to the amount of damages which will actually be sustained in the event of breach. When a coach leaves an institution, how can this damage be calculated? What economic damage is actually attributable to the departure of the coach? Unless this damage can be determined with something more than mere speculation, the liquidated damages clause will not be enforceable. Therefore, although the institution may have some recourse, it will be difficult to quantify any loss of revenue related to a coaching change.

97. Rodgers v. Georgia Tech Athletic Ass'n, 303 S.E.2d 467 (Ga. Ct. App. 1983).
98. University of Tulsa v. Henshaw, pending in Tulsa County District Court.

In addition to the monetary concerns raised above, it is possible that a coach who is fired may allege defamation by the university. The dismissal of the coach may be construed as evidence that the coach was not performing his job adequately. In a recent case dealing with this issue a football coach was dismissed from his job before his contract expired. He successfully obtained a restraining order and the school was prevented from dismissing him during the term of his contract.[99]

In all of these cases, there was a specific term of employment which had been agreed upon by the parties. The result of employment cases is altered drastically if a person is simply serving at will (i.e., there is no agreement regarding the term of employment). If a person is serving simply at the pleasure of the university, the person may generally be discharged without any statement of reason and without due process protection.[100]

Employment Contracts — K-12

Employment contracts in the public schools are not governed only by common law contract principles. Since most of the coaches at this level are also teachers, each state's tenure statutes set many of the applicable guidelines regarding dismissal.

As a general rule, a coaching contract does not fall under the protection of the state's tenure act. Coaching contracts are usually for a term of one year. Thus, there is no "legal" expectation of renewal even if the contract has been successively renewed for a number of years.[101] Although a person may become tenured as a teacher, most states do not allow a coach to become tenured.[102] However, if an evaluation policy exists which covers teachers and coaches alike, an administrator should not disregard that evaluation procedure in dealing with coaches.[103]

Another question which often recurs is whether a coach's resignation of his coaching responsibilities is considered to be a resignation from his teaching position. Once again, reference must be made to a state's particular statutes and policies to resolve the question. In an Oregon case, a teacher and coach resigned her responsibilities as a gymnastics coach. The school district argued that her coaching assignment was an indivisible part of her teaching contract. Thus, a resignation from coaching was a resignation from all her duties. The court found for the teacher

99. Yukica v. Leland, No. 85-E191 (N.H. Super. Ct. 1985).

100. Hill v. Board of Trustees of the Cal. State Univ. Sys., 238 Cal. Rptr. 799 (Ct. App. 1987).

101. Hahn, *In re*, 386 N.W.2d 789 (Minn. Ct. App. 1986).

102. Bryan v. Alabama, 472 So. 2d 1052 (Ala. Ct. App. 1985); Lagos v. Modesto City Schools Dist., 843 F.2d 347 (9th Cir. 1988).

103. Hosaflook v. Nestor, 346 S.E.2d 798 (W. Va. 1986); Grounds v. Tolar Indep. School Dist., 707 S.W.2d 889 (Tex. 1986).

since there was no statute, policy, or rule which stated that her extra duties were indivisible from her teaching assignments.[104] A recent Kansas case also supported teachers' rights to resign their supplemental contracts without affecting their primary teaching duties.[105] An earlier Kansas decision held that the primary contract of a teacher cannot be terminated because of a teacher's refusal to accept a supplemental coaching contract.[106]

A final point of inquiry concerns the types of misbehavior which are considered to be grounds for the termination of a coach/teacher. Some of the most common alleged improprieties are: (1) insubordination, (2) incompetency, (3) immorality, and (4) neglect of duty. A few illustrative cases follow.

In regard to insubordination, there are two cases worth noting. First, an athletic director was dismissed because of insubordination, direct disobedience of board policy, unauthorized expenditures, and many inappropriate budgetary decisions.[107] Second, a football coach failed to follow school policies. Among the allegations made was the coach's use of a volunteer assistant coach which violated both state athletic association regulations and instruction from the superintendent.[108]

In terms of immorality, two wrestling coaches/teachers were dismissed because of their conduct at an away tournament. Instead of chaperoning the athletes, they went out drinking and to a party (also accompanying them was the female chaperone of the cheerleaders). In their absence, the students left the motel and brought beer back to the motel. When the chaperones returned at a late hour, the cheerleaders were sleeping in the wrestlers' room. The chaperones allowed the cheerleaders to remain there overnight instead of transporting them back to their own motel. The evidence supported the charge of immorality.[109]

Finally, there are two neglect of duty cases which should be discussed. First, a tenured teacher who was also the cheerleader sponsor was dismissed for neglect of duty after she allowed the cheerleaders to drink beer at their hotel room and also drank beer with them. The appeals court upheld the dismissal.[110] The Colorado Supreme Court affirmed this ruling finding that it was within the school board's discretion to dismiss her under these circumstances.[111]

In a rather sad commentary regarding the importance of interscho-

104. Babitzke v. Silverton Union High School, 695 P.2d 93 (Or. Ct. App. 1985).
105. Hachiya v. Board of Educ., Unified School Dist. No. 307, Salina County, 750 P.2d 383 (Kan. 1988).
106. Unified School Dist. No. 241 v. Swanson, 717 P.2d 526 (Kan. Ct. App. 1986).
107. Merchant v. Board of Trustees, 492 So. 2d 959 (Miss. 1986).
108. King v. Elkins Pub. Schools, 733 S.W.2d 417 (Ark. Ct. App. 1987).
109. Schmidt v. Board of Educ., 712 S.W.2d 45 (Mo. Ct. App. 1986).
110. Blaine v. Moffat County School Dist. No. 1, 709 P.2d 96 (Colo. Ct. App. 1985).
111. *Id.* at 748 P.2d 1280 (Colo. 1988).

lastic athletics, a teacher was dismissed for her alleged misconduct in refusing to return to her teaching duties. The plaintiff, an English teacher, had the school's star basketball player in her early morning class. The player had a number of absences in her class and she reported this to the principal. She assigned makeup work to the player, which he did not complete, and continued to miss class. At the end of the grading period she gave the player a failing grade. Thereafter, she received numerous threats to her safety from community members and athletic department personnel because of the grade given to the star player. Finally, the principal asked her to change the grade in exchange for a good teaching evaluation. The plaintiff, in severe emotional distress, changed the grade to a "D-" and left the building. The plaintiff then sought treatment from a psychiatrist and was unable to return to her teaching duties. Although the superintendent knew that she was under psychiatric treatment, he suspended her for not returning to work and then discharged her for dereliction of her duties. The Supreme Court of Tennessee found that the teacher was not guilty of misconduct and ordered her reinstatement.[112]

There are other cases dealing with employment issues in this monograph. Employment disputes which implicate first amendment concerns are in the section dealing with first amendment freedom of speech issues. Other employment disputes may be found in the due process section.

Summary

This chapter has dealt with some significant contractual concerns for sport administrators. Lease agreements should contain indemnification clauses favorable to the lessor institution. Lessees should also provide certificates of insurance and name the lessor as an additional insured on the policy.

Contracts with concessionaires should be structured so that the vendor is an independent contractor. A careful investigation of the financial stability and business reputation of the concessionaire should be undertaken before using the concessionaire's services. Once again, an indemnification clause is a critical part of the contract.

Incorporate language in the athletic grant-in-aid which negates its construction as a contract. Institute and enforce policies which provide that coaches are never to promise prospective athletes anything but one year scholarships. Advise all athletes that the period of a scholarship is one year.

Look carefully at vendor contracts. Be sure that all quantity and quality provisions are to your satisfaction. Limit a vendor's right to make "reasonable" substitutions of goods or services. Negotiate a cap on

112. McGhee v. Miller, 753 S.W.2d 354 (Tenn. 1988).

permissible price increases by the vendor. Do not neglect to understand the termination and cancellation provisions.

When you use independent contractors (e.g., game officials, team physicians), make sure that the document expresses that relationship. Make sure that your conduct toward the party is consistent with an independent contractor relationship.

On the collegiate level, negotiate clauses in prospective coaches' contracts to try and limit their recovery of perquisites upon a breach of the employment contract by the university. Consider what remedies you may wish to enforce against a coach who breaches his contract.

In regard to public school coaching contracts, refer to your state's statutory and case law to determine: (1) whether a coach can receive tenure, (2) whether coaching contracts are divisible from teaching contracts, and (3) what types of misbehavior are sufficient to dismiss a teacher/coach.

4
Constitutional Law

First Amendment

Freedom of Speech

Many of the sport-related freedom of speech cases relate to statements made by teachers/coaches which allegedly result in their dismissal from employment. One such case, *McGee v. South Pemiscot School District*,[113] is illustrative of this type of first amendment case. In *McGee*, a teacher/track coach's employment contract was not renewed even though his performance had been publicly praised by three of six school board members. The board decided to discontinue the track program and public controversy ensued. Three of the board members wrote a letter to the local newspaper stating that McGee had recommended that the board discontinue the track program. In response, McGee wrote a letter, which was published in the paper, denying that he had made such a recommendation. Shortly thereafter, McGee's contract was not renewed and he brought an action alleging a violation of his first amendment rights.

The court relied upon the Supreme Court decision of *Pickering v. Board of Education*[114] to resolve the dispute. Public employees retain their first amendment rights but the courts must arrive at a "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[115] In using the *Pickering* guidelines, this court held that McGee's letter was constitutionally protected because: (1) it addressed a public issue; (2) it did not contain knowingly or recklessly false statements; (3) it did not undermine McGee's ability to function as a teacher and coach; and (4) it did not interfere with the operation of the school. Although McGee's letter may have strained his relationship with some of the board members, it did not create disharmony between McGee and his immediate superiors nor did it directly affect school operations.[116] McGee's first amendment rights were protected in this situation.

113. McGee v. South Pemiscot School Dist., 712 F.2d 339 (8th Cir. 1983).
114. Pickering v. Board of Educ., 391 U.S. 563 (1968).
115. *Id.* at 568.
116. McGee v. South Pemiscot School Dist., 712 F.2d 339, 342 (8th Cir. 1983).

Two points from *McGee* often recur in other sport-related first amendment disputes. The first question is whether the matter in dispute is considered to be a "public issue." In *McGee*, of course, the discontinuance of the track program became a public controversy because it was an issue in the election campaign for school board members. Also, the board wrote about the matter in the local newspaper. However, there are a number of situations in which plaintiffs try to raise the "public issue" criterion as a constitutional mask hiding their own private concerns, which should not receive constitutional protection.

For example, two members of a university basketball team had their scholarships terminated after voicing their opposition to the renewal of their coach's contract. Their first amendment rights were not implicated because the comments which were ostensibly made on a matter of public concern (i.e., the suitability of this coach for continued employment), really stemmed from a continuing internal private problem with the coach.[117]

Likewise, in another case dealing with the "public issue" criterion, a high school teacher was dismissed from his teaching position allegedly in retaliation for statements he made to the local newspaper regarding his dissatisfaction with the school board's decision to replace him as basketball coach. This court relied on *Pickering* as well as *Connick v. Myers*[118] in arriving at its decision. The statements made by the plaintiff were solely to make a self-serving point about his termination as basketball coach. They were related to a matter of personal concern and thus did not fall into the realm of constitutionally protected speech.[119]

In another case, a nonprobationary teacher appealed from a decision of the school board not to renew his teaching contract because of insubordination. The teacher had been belligerent at faculty meetings and in private meetings with the principal. However, the plaintiff alleged that the real reason for his dismissal was the statement that he had made in class regarding the lack of black cheerleaders at the school. The appellate court found that his termination was based on his insubordination and belligerent behavior.[120]

In summary, the criterion of a "public issue" can only be met by a showing that the matter is truly of general public concern. It is not appropriate to seek the safe harbor of constitutional protection for concerns which are private in nature, such as one's own employment situation or internal disputes within an organization.

The second point from *McGee* which deserves further consideration is what is "disruption of the operation" of a program. From *McGee*, it is

117. Marcum v. Dahl, 658 F.2d 731 (10th Cir. 1981).
118. Connick v. Myers, 461 U.S. 138 (1983).
119. Vukadinovich v. Bartels, 853 F.2d 1387 (7th Cir. 1988).
120. Caldwell v. Blytheville, Ark. School Dist. No. 5, 746 S.W.2d 381 (Ark. Ct. App. 1988).

clear that more than mere discomfort or displeasure with someone's speech is required to be an interference with operations. *McGee*, however, dealt with a plaintiff who was a teacher/coach and thus, was not a person entrusted with policy making authority. This distinction is one which was elaborated upon in a recent case dealing with a university athletic director.

In this case, a former athletic director sued the university to challenge his termination. He alleged that his termination violated his rights of free speech. The plaintiff had been hired to bring the athletic program into full compliance with NCAA rules. As time went on, the plaintiff spoke openly regarding various violations of NCAA rules, much to the chagrin of the university president and the board of trustees. The court used *Pickering* and *Connick* in arriving at its decision. First, it is obvious that the matters about which the plaintiff spoke are matters of public concern. However, the plaintiff was considered to be a "policy level official" at this university. Thus, the university had an important interest in showing that the plaintiff was indeed compatible with the president and the board of trustees. He therefore can be dismissed for expressing views that display a policy disagreement with his superiors because there would be a question of his ability to carry out the policy choices of his superiors in a vigorous manner.[121]

In summary, freedom of speech cases for public employees are decided pursuant to the *Pickering* guidelines which balance the rights of the plaintiff as a citizen against the need for the public institution to perform efficiently. Assuming the statements in question are true, the critical matters for consideration are whether the statements: (1) address a public issue, (2) affect the plaintiff's ability to perform his duties, or (3) interfere with the operation of the institution. A "public issue" must truly concern a matter of general interest and not be a camouflage for personal interests. Also, the question of whether statements interfere with the operation of the institution has different implications for a plaintiff who is a policy-making official.

Free Exercise of Religion

The free exercise of one's religion is a fundamental right in our constitutional framework. As such, the government must prove that a regulation which impinges upon free exercise rights is necessary to further a compelling state interest. Also, the state actor must usually show that this regulation is tailored to be the least restrictive means of achieving the state interest.

Although the above statement represents an accurate "theoretical" statement of the law, it is difficult to see that this theoretical premise is truly applied in sport-related free exercise cases. Even though the "theoretical" burden of the government, as stated above, is very stringent, the

121. Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988).

application of this test in sport cases displays a definite pro-government bias. Perhaps this bias can be explained by pointing out that courts generally do not hold athletic participation in great esteem (see the due process discussion on property interests). Therefore, if athletic participation is a privilege and not a right, this factor may color the way courts decide free exercise cases in a sports setting.

For example, a Seventh Circuit case involved the wearing of yarmulkes by Jewish student-athletes. A high school association rule forbade basketball players to wear hats or other headwear. The Jewish plaintiffs challenged this rule as a burden on their free exercise of religious beliefs since the rule encompasses yarmulkes. The rule was upheld and in a turnabout of the usual application of the least restrictive means test, the court put the burden on the *plaintiffs* (instead of the defendants) to suggest alternative more secure means of covering the head.[122] The result was more of an expedient compromise than a true consideration of the plaintiffs' fundamental first amendment rights.

In another case which illustrates the same type of pragmatic balance of interests reasoning, a plaintiff objected to a basketball coach's rule which provided that absences from practice except for illness or death in the family were unexcused. Unexcused absences prevented a player from participating in the next game. The plaintiff wanted to be excused from practice on some occasions in order to attend catechism classes. The court held for the coach on the rationale that the plaintiff could attend catechism classes at another church and time. The school's interest in penalizing students for not attending practice outweighed the plaintiff's interest in attending catechism classes during practice time.[123]

Establishment of Religion

The first amendment prohibits government from making a law "respecting an establishment of religion." Any institution, therefore, acting as a "state actor" must avoid engaging in religious activities. For example, a voluntary group prayer prior to a game violates the establishment clause limitation.[124]

In an interesting case which illustrates the interplay of freedom of speech, free exercise, and establishment clause considerations, fourteen football players from a state university intended to wear black armbands in protest of a game against Brigham Young, a Mormon institution. The prospective protesters explained to their head coach that their protest stemmed from opposition to the Mormon church's beliefs regarding blacks. The football coach, however, dismissed the athletes from the team since their actions violated a rule against protests by players.

122. Menora v. Illinois High School Ass'n, 683 F.2d 1030 (7th Cir. 1982).
123. Keller v. Gardner Community Consol. Grade School Dist. 72C, 552 F. Supp. 512 (N.D. Ill. 1982).
124. Wallace v. Jaffree, 472 U.S. 38 (1985).

The dismissed athletes sued on the basis that their dismissal contravened their first amendment freedom of expression rights. However, the district court felt that if the university had allowed the players to protest, it would have, in effect, violated the establishment of religion clause. The condonation of a "religious protest" by the players would violate the neutrality which a state university should have regarding religious matters.[125] On appeal, the plaintiffs were again unsuccessful because their freedom of speech rights were not paramount to Brigham Young's right to freely exercise its religion.[126]

Drug Testing

As a society, we have issued a call to arms in the "war on drugs." The pervasiveness of this problem has touched our educational institutions on all levels and in response some administrators have instituted drug testing programs. The focus of this chapter is on the legal challenges which may be brought regarding drug testing which singles out participants in interscholastic or intercollegiate athletic programs. This discussion will first focus on the interscholastic setting and then address intercollegiate programs.

Challenges to interscholastic drug testing programs are multi-faceted in the number of constitutional provisions which are implicated. In order to address these concerns, I will do so in the context of a recent drug testing case in which the Seventh Circuit upheld a school's right to require athletes and cheerleaders, selected at random, to submit to drug tests.[127] Regardless of one's opinion on the outcome of this case, *Schaill v. Tippecanoe County School Corporation* contains a very complete analysis of the constitutional challenges to such a program.

First, the fourth amendment provides that people shall be secure from unreasonable searches and seizures. There are, therefore, two considerations under this amendment. First, is a random urine testing program to be considered a search? Those who say that urine testing is not a search point to the argument that one can have no legitimate expectation of privacy in bodily wastes since they are going to be secreted anyway. This argument fails in view of the *Schaill* case which held that urinalysis was a search under the fourth amendment.[128] Additionally, we now have the benefit of two Supreme Court cases which dealt with the question of urine testing in employment settings. Although these cases are not pertinent to some of the matters raised in a sport-related drug testing case, we are well-advised to adopt the Court's reasoning which

125. Williams v. Eaton, 310 F. Supp. 1342 (D. Wyo. 1970).
126. Williams v. Eaton, 468 F.2d 1079 (10th Cir. 1972).
127. Schaill v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988).
128. *Id.* at 1313.

clearly holds that a drug testing program which uses urinalysis is a search under the fourth amendment.[129]

Less clear is the resolution of the second fourth amendment consideration (i.e., whether the search in question is unreasonable). In *Schaill*, the question of reasonableness was raised because the athletes were randomly selected to undergo testing; there was no individualized suspicion of drug use. The *Schaill* court resolved this point by referring to the *Skinner* case (one of the Supreme Court cases mentioned above) which held that the lack of individualized suspicion does not raise a presumption of unreasonableness.[130]

Also, the *Schaill* court found that the drug testing searches were reasonable since athletes have diminished expectations of privacy. The court came to this conclusion based on the fact that athletes engage in communal undress and, in this school system, athletes produced urine samples for the testing of sugar as a part of their medical examinations to participate in athletics. From these two factors, the court found that athletes did not have the same expectations of privacy as other students with regard to urine testing.

There were other considerations which the court looked at in arriving at its decision regarding the reasonableness of the search. First, since athletes are engaged in activities which are a privilege and not a right (see the discussion regarding due process), it is permissible to place additional burdens upon this participation. Also, athletes are role models for the other students and can be expected to be exemplars for their peers.

The other constitutional question which was addressed in *Schaill* was that of due process. Did the testing procedure violate the plaintiffs' fourteenth amendment rights of due process? Once again, the court upheld the testing program because of the safeguards built into the program to assure anonymity, privacy, and accuracy.[131] First, the program was truly random and athletes were selected by number in a neutral fashion. Second, the specimen was given in a closed lavatory stall while the monitor waited outside the stall. Third, a sample testing positive initially would be retested using a more accurate method. If the retest still indicated a positive finding, the student and his parents had the option of having the sample tested at a laboratory of their choice. The student had an opportunity to meet with the athletic director to explain the test result and to determine if there was an innocent reason for the positive reading. Finally, the penalties for testing positive did not involve expulsion or suspension from school nor any type of criminal sanction. The penalties were progressive in terms of length of suspension from participation in athletics for subsequent violations.

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129. National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989); Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989).

130. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989).

131. Schaill v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988).

All of the foregoing were important factors in meeting the due process challenges to this drug testing program. The court felt that the program was tailored in a reasonable fashion to meet the school's substantial interest in deterring drug use.

Before discussing drug testing programs in intercollegiate athletics, there is one more constitutional challenge to address. Drug testing programs may be challenged as violating one's first amendment right to privacy. The right of privacy may be used to protect one's body from offensive intrusion and the state can limit this right only upon showing a compelling state interest. The state interests which are usually argued are: (1) preventing an unfair competitive advantage to those who have used drugs to enhance performance, and (2) preventing physical harm to the athlete who has used drugs. Another viable argument would be the prevention of harm to other participants but the relationship between drug use and safety concerns for others has not yet been well-established.

There are two cases dealing with drug testing programs on the intercollegiate level that illustrate the divergent views courts can take regarding the right to privacy argument. First, a female diver at Stanford University challenged the NCAA drug testing program by refusing to sign the consent form allowing drug testing. At the trial court level, the plaintiff obtained an injunction. The judge was concerned that the urinalysis might reveal other personal matters such as taking birth control medication. An athlete does not give up the right to a reasonable expectation of privacy just because of a desire to participate in athletics.[132] (Keep in mind that this case was decided prior to the Supreme Court decision in *Tarkanian* which dealt with "state action.")

In another case, a female track athlete objected to the university's and NCAA's urine testing program as being an unreasonable infringement upon the student-athlete's expectation of privacy. Once again, the plaintiff was concerned about the possibility that private facts about the athlete might be revealed (e.g., birth control, treatment of depression, epilepsy medication). The district court addressed the pertinent challenges in considering plaintiff's motion for a preliminary injunction. Although the court found that the testing was a "search," it also decided that the search was reasonable. According to this court, athletes have lesser expectations of privacy because they engage in communal undress and undergo health examinations. Furthermore, there was no provision in the program to reveal personal matters which might be detected in the course of testing. Finally, the denial of athletic eligibility for a failure to sign the consent form is permissible since participation in athletics is not a constitutionally protected activity. This court gave great deference to expert testimony which promoted drug testing as the best

132. LeVant v. NCAA, No. 619029, Superior Court of California, Santa Clara County (1987).

alternative to decreasing drug misuse. Based on this analysis, the court denied the plaintiff's motion for a preliminary injunction.[133] This case was subsequently heard by the Ninth Circuit which addressed the issue of whether the case was properly removed to federal court. It ruled that the university's third party complaint against the NCAA was a matter of state law. This matter has been remanded to the district court with directions that this court remand the entire case back to the state court.[134]

Bearing in mind that cases brought against the NCAA may now be foreclosed because of a lack of "state action" (*Tarkanian v. NCAA*), these two cases reflect the divergent views courts may take on the invasion of privacy question. Some courts may be persuaded that athletes do indeed have substantial privacy rights to protect and that the right to participate in athletics is not an adequate trade-off for the loss of valuable privacy rights. On the other hand, some courts may hold that athletes have lesser expectations of privacy and that the institutional interest in deterring drug misuse is, on balance, more important than an intrusion into an athlete's life.

Finally, there is a case in which a plaintiff alleged that a drug testing program at a private university violated the state's privacy statute. The plaintiff, a member of the university's track team, refused to sign the drug testing consent form and was declared ineligible for athletic participation. The suit was brought alleging a violation of the state's privacy statute which guarantees a right against unreasonable, substantial or serious interference with privacy. In this jurisdiction, the statute had been used primarily to prevent the public dissemination of information. Since the plaintiff had not alleged that there would be a public disclosure of confidential information, there was no statutory violation.[135]

Due Process

There are two constitutional provisions which guarantee persons the right not to be deprived of life, liberty, or property, without due process of law. The fifth amendment forbids deprivations of those rights by the federal government and the fourteenth amendment refers to "state action."

Three criteria must be established before proceeding to the question of what amount of due process is sufficient. First, an aggrieved party must show that the deprivation has been taken by a federal or state government or a representative thereof. For the purpose of this discussion, this criterion shall be called the "state action" requirement. Second, the aggrieved party must establish that he is a "person" for constitutional purposes. Third, an interest in life, liberty, or property must be infringed upon in order to proceed with a due process claim. Only after

133. O'Halloran v. University of Wash., 679 F. Supp. 997 (W.D. Wash. 1988).
134. O'Halloran v. University of Wash., 856 F.2d 1375 (9th Cir. 1988).
135. Bally v. Northeastern Univ., 532 N.E.2d 49 (Mass. 1989).

these three criteria are established does a court address the question of what kind of due process protections are necessary.

State Action

It is clear for the purpose of establishing "state action" that actions taken by a public school or a public university/college fall within this criterion. The more difficult question is determining the status of athletic associations which serve as governing bodies for interscholastic or intercollegiate competition. Prior to 1982, courts generally held that high school and collegiate athletic associations, although private voluntary organizations, were to be considered state actors for due process purposes. In coming to this consensus, courts most often used the "entanglement theory" to find governmental action. Under this theory, the courts found that the association's activities were so intertwined with the state that the association's activities were, in effect, supported or sanctioned by the government.[136]

However, in 1982, the Supreme Court decided three cases[137] which subsequently constricted the limits of state action. Although none of these cases dealt with state action in a sport-related context, the message was clear (i.e., state action is not to be as broadly construed as in the past).

In 1984, the Fourth Circuit had the opportunity to apply this new precedent in a case dealing with the NCAA.[138] The plaintiff, Arlosoroff, was an Israeli citizen who enrolled at Duke University and played on the university tennis team. After one year of competition, however, the NCAA ruled him ineligible for further play. The plaintiff's suit against the NCAA alleged a denial of due process and equal protection. The threshold question to be addressed, however, was whether the NCAA, a private voluntary association, could be considered to be engaged in state action.

Although earlier courts which had considered this question in reference to the NCAA had overwhelmingly found the NCAA to be involved in state action, the *Arlosoroff* court felt compelled to decide otherwise based on the 1982 Supreme Court cases mentioned above. No longer was indirect involvement with the state sufficient. Rather, the test, formulated in a 1986 case which followed *Arlosoroff*, was: (1) whether the association was serving a function which was *exclusively* the state's pre-

136. Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ., 552 S.W.2d 685 (Ky. Ct. App. 1977); Parish v. National Collegiate Athletic Ass'n, 361 F. Supp. 1220 (W.D. La. 1973), *aff'd* 506 F.2d 1028 (5th Cir. 1975); Howard v. National Collegiate Athletic Ass'n, 510 F.2d 213 (D.C. Cir. 1975).

137. Blum v. Yaretsky, 457 U.S. 991 (1982); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

138. Arlosoroff v. National Collegiate Athletic Ass'n, 746 F.2d 1019 (4th Cir. 1984).

rogative; or (2) whether the state caused, controlled, or directed the association's action.[139]

For a period of time there was conflict among the circuits in deciding this question of state action and the status of the NCAA. We now have a Supreme Court decision which has addressed this very question. In *NCAA v. Tarkanian*,[140] the Court discussed the question of whether the NCAA became a state actor because of its joint action with the state (i.e., the University of Nevada at Las Vegas — UNLV) in suspending Tarkanian from employment as a basketball coach. In a five-to-four decision, the Supreme Court held that the NCAA did not act jointly in committing the action and, therefore, was not a state actor for the purposes of this situation.

One commentator has said that this decision should not be considered a definitive answer to whether the NCAA can be deemed to be a state actor under other factual situations. For example, the outcome may vary if the plaintiff is a student-athlete rather than an employee of an institution.[141] In summary, the NCAA "state action" question has been, in one sense, resolved by *Tarkanian*, but due to the language of the decision and the split among the Court members, many questions regarding this issue remain unresolved.

There is also the question of state action as applied to high school athletic associations. As noted above, the earlier majority opinion was that high school associations were closely involved with public education and thus considered to be state actors. Although the majority opinion is still the same, there may be a discernible trend, just as with the NCAA cases, to decide differently based on the 1982 Supreme Court precedent. In fact, in a 1988 Indiana case, a district court found that the conduct of the Indiana High School Athletic Association was not state action. This holding was based on the Supreme Court precedent as well as the *Arlosoroff* case which dealt with the NCAA. In particular, the district court found the reasoning of *Arlosoroff* to be equally applicable to high school athletics and the IHSAA.[142] This question is one which is in a state of flux and should be carefully monitored.

Person

Individuals, are, of course, considered to be "persons" for the purposes of due process considerations. The issue is whether an institution can be considered a "person" entitled to due process. The answer is "most likely" since even corporations have been given "person" status for the purposes of constitutional protection.

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139. Graham v. National Collegiate Athletic Ass'n, 804 F.2d 953, 958 (6th Cir. 1986).
140. National Collegiate Athletic Ass'n v. Tarkanian, 109 S. Ct. 454 (1988).
141. Schubert and Schubert-Madsen, The NCAA as a State Actor: Decisions, Causes and Effects, 1 *Legal Issue in Sport* 104 (1989).
142. Anderson v. Indiana High School Athletic Ass'n, 699 F. Supp. 719 (S.D. Ind. 1988).

Life, Liberty, or Property

In a due process matter, an aggrieved "person" who has suffered some deprivation due to "state action" cannot prevail unless the interest involved is considered to be a "life, liberty, or property" interest. For the most part, the sports realm does not raise the question of a life interest. Therefore, a discussion of liberty and property interests is more pertinent.

Liberty Interest. Generally speaking, courts do not recognize the right to participate in athletics as a liberty interest. In the sports context, the liberty interest has been argued successfully when someone suffers a "stigma" because of the action taken. The stigmatization, to be upheld as a liberty interest, must generally be accompanied by a loss of a property right.

For example, in the case of *Stanley v. Big Eight Conference*,[143] a head football coach was relieved of his coaching responsibilities because of a NCAA investigation which implicated him in NCAA rules violations. Stanley brought a due process suit and the court found a liberty interest because the action taken would have a stigmatizing effect upon Stanley's ability to pursue his livelihood as a coach. This holding is consistent with the case of *Board of Regents of State Colleges v. Roth*[144] in which the Supreme Court ruled that a plaintiff needed to show a "stigma plus" in order to prevail.

The "stigma plus" rationale can be found in two recent cases dealing with the refusal to renew coaching contracts in secondary schools. In the first case, a baseball coach, who had held the position for the past seven years, did not have his coaching contract renewed. There was no protectible liberty interest involved because there was no stigma attached to the nonrenewal (i.e., there were no allegations of misconduct made). Who is a good coach is the subject of debate and there is no shame to lose one's job in such an argument.[145] In the second case, a high school basketball coach's contract was not renewed. However, since the plaintiff retained employment as a teacher with the defendant, there was no violation of a liberty interest.[146]

In summary, in order for the plaintiff to succeed in establishing a protectible liberty interest, there must be more than the stigma of a dismissal. That something more must be some type of effect upon a tangible property interest (e.g., the ability to pursue one's livelihood).

Property Interest. The court's understanding of what may be considered to be a property interest stems, once again, from the *Roth* decision. From this case, we take the definition of property as all interests to which an individual could be deemed "entitled." An entitlement occurs

143. Stanley v. Big Eight Conference, 463 F. Supp. 920 (W.D. Mo. 1978).
144. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).
145. Lagos v. Modesto City Schools Dist., 843 F.2d 347, 350 (9th Cir. 1988).
146. Diehl v. Albany County School Dist. No. 1, 694 F. Supp. 1534 (D. Wyo. 1988).

only if someone has a current interest in or current use of property. It must be more than mere expectations in property or a desire to have the property. Based on this definition, a number of courts have dealt with cases in sport in which athletes have alleged a deprivation of their property interests.

First, there are cases in which the athlete argues that his right to participate in athletics is, in itself, a property right. This point turns on the question of whether participation in athletics is considered a right or a privilege.

High school athletes who try to assert a property right in athletics argue that the right to an education includes the right to participate in extracurricular activities (e.g., athletics). Although the Supreme Court has not recognized a general constitutional right to education,[147] this argument presumes that students have such a right based on attendance requirements mandated by the states. The majority position, however, is that educational rights do not encompass activities outside the classroom and thus, the property interest argument fails.[148] On the collegiate level, the courts also generally agree that there is no property interest in athletic participation.[149]

However, this outcome changes on the collegiate level if the athlete is deprived not only of the chance to participate but also of a scholarship. The termination of a scholarship to which the athlete is entitled is the deprivation of a property interest.[150]

If the facts are altered again, the result becomes less predictable. If, for example, the player's scholarship is continued but he is kept from participating in the sport, can the athlete argue that he is being deprived of a property interest in that his chances of obtaining future employment with a professional sports franchise are severely diminished because of his inability to show his talents at the collegiate level? Some courts have upheld the athlete's argument on this point[151] but more often, courts have felt that the interest in a future professional contract is

147. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

148. Robinson v. Illinois High School Ass'n, 195 N.E.2d 38 (Ill. App. Ct. 1963); Stock v. Texas Catholic Interscholastic League, 364 F. Supp. 362 (N.D. Tex. 1973); Palmer v. Merluzzi, 689 F. Supp. 400 (D.N.J. 1988); Haverkamp v. Unified School Dist. No. 380, 689 F. Supp. 1055 (D. Kan. 1986); Contra Moran v. School Dist. #7, Yellowstone County, 350 F. Supp. 1180 (D. Mont. 1972).

149. National Collegiate Athletic Ass'n v. Gillard, 352 So. 2d 1072 (Miss. 1977).

150. Colorado Seminary v. National Collegiate Athletic Ass'n, 417 F. Supp. 885 (D. Colo 1976), *aff'd* 570 F.2d 320 (10th Cir. 1978); Gulf South Conference v. Boyd, 369 So. 2d 553 (Ala. 1979).

151. Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972); Hall v. University of Minnesota, 530 F. Supp. 104 (D. Minn. 1982).

too speculative to be considered a protectible property interest.[152] The courts that have upheld the property interest argument in this situation have been dealing with elite athletes who, in effect, were recruited to be athletes and not scholars. In fact, one court stated that the plaintiff was recruited to be "a basketball player and not a scholar" and that "his academic record reflects that he has lived up to those expectations."[153]

Generally, high school athletes are unsuccessful in arguing that the possibility of a college scholarship is a property interest. The courts reject this possibility as being too speculative just as they reject the possibility of a future professional career as being too speculative.[154]

In summary, a plaintiff alleging a property interest must show more than the deprivation of participation in the athletic activity. The cancellation of a scholarship to which the athlete is currently entitled is sufficient to show a protectible property interest. The majority of courts hold that a future possibility of a professional athletic contract is too speculative. For high school athletes, a future college scholarship is also considered to be too speculative to be protected as a property interest.

What Amount of Due Process Must Be Given?

Once a plaintiff has met the above criteria, the courts will hold that due process must be given. The question then becomes what amount of due process must be provided. The answer to this inquiry varies substantially based on the situation under consideration.

Due process involves two minimum requirements: (1) the right to a hearing, and (2) notice of the hearing and of allegations of wrongdoing. The extent to which these requirements are elaborated upon depends upon the importance of the right involved and the degree to which additional safeguards in the procedure can reduce the possibility of error in the findings. The courts also consider the burdens which will be imposed upon the administrative body in complying with added safeguards. This type of balancing process is based on the criteria of *Mathews v. Eldridge*,[155] a Supreme Court case which delineated three factors in determining the amount of due process required: (1) the magnitude or importance of the interest involved; (2) the extent to which the requested procedure would reduce errors in decision-making, and (3) the burden on the administrative body to give the safeguards.

There are, therefore, no concrete standards to apply in this area. Due process is an elusive concept which involves the balancing process mentioned above. Two sport-related due process cases will be presented,

152. Fluitt v. University of Nebraska, 489 F. Supp. 1194 (D. Neb. 1980); Colorado Seminary v. National Collegiate Athletic Ass'n, 417 F. Supp. 885 (D. Colo. 1976), *aff'd* 570 F.2d 320 (10th Cir. 1978).

153. Hall v. University of Minnesota, 530 F. Supp. 104 (D. Minn. 1982).

154. Taylor v. Alabama High School Athletic Ass'n, 336 F. Supp. 54 (M.D. Ala. 1972); Scott v. Kilpatrick, 237 So. 2d 652 (Ala. 1970).

155. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

however, to give an understanding of how the balancing process is applied. First, in the *Stanley* case, which was previously discussed in connection with the liberty interest, the court found due process to be lacking. The author of the investigative report, which was the primary evidentiary source in the case, drew inferences beyond the factual statements presented to him in interviews. Not only were there numerous unnamed sources and inferences, the report was filled with hearsay and double hearsay.

To try to combat some of these deficiencies, the court suggested that all statements be put in writing, preferably in affidavit form. Also, Stanley should be provided with summaries of the statements prior to the hearing. If Stanley challenged the allegations in a statement, he should be allowed to cross-examine the witness at the hearing.[156]

In another due process case dealing with student-athletes, *Behagen v. Intercollegiate Conference of Faculty Representatives*, two university basketball players had been suspended for the season because they were brawling in a game. The type of due process safeguards this court required included: (1) written notice of the time and place of the hearing at least two days prior to the hearing, (2) notice of the specific charges against the athlete, (3) a hearing in which the athletic director hears both sides of the story (but does not include the right to cross-examine witnesses), (4) the presentation of direct testimony at the hearing, (5) the provision of a list of witnesses to the plaintiffs prior to the hearing, (6) a written report of the findings of fact and the basis for punishment, (7) tape recordings of the proceedings, and (8) an appeals channel.[157]

This laundry list of due process protections which were required in the above cases was rather lengthy. However, in both cases, the interests of the plaintiffs were substantial. In the *Stanley* case, a coach's livelihood was at stake, a rather important liberty interest. In the *Behagen* case, the court acknowledged the property interest of the plaintiffs in that a suspension would prevent these players from displaying skills which would almost certainly lead to professional contracts. Of course, for the protection of less substantial interests, less elaborate due process safeguards are required.

One commentator[158] has suggested that *Goss v. Lopez*,[159] a Supreme Court due process case, serve as the benchmark for sports due process cases. In *Goss*, the court held that a student suspended for ten days or less for violating school rules was entitled to a "hearing." The hearing, however, was very rudimentary. It consisted of informing the student of the alleged misconduct and, if the student denied the charge, informing

156. Stanley v. Big Eight Conference, 463 F. Supp. 920 (W.D. Mo. 1978).

157. Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602 (D. Minn. 1972).

158. Buss, Due Process in the Enforcement of Amateur Sports Rules, *Law and Amateur Sports* (R. Waicukauski ed. 1982).

159. Goss v. Lopez, 419 U.S. 565 (1975).

the student of the evidence on which the charge was based and allowing the student the chance to present his version of the situation.[160] In a sports due process case, the interest in question should be compared with the ten-day suspension in *Goss*. If the interest can be equated to the loss of ten days of school, minimal procedures are necessary. If, however, the interests are greatly more substantial than those in *Goss*, more extensive safeguards are necessary.[161]

Equality of Programs

The issue of equality of opportunities in athletic participation or employment for females and males is an exceedingly complex area, one which in no way can be comprehensively covered in a few pages in a monograph. Part of the complexity of this area lies in the variety of legal challenges which can be made regarding sex-based classifications in sport. This chapter will review three types of causes of action: (1) equal protection, (2) title IX, and (3) the Equal Pay Act and title VII. Each section will explain the legal theory underlying the cause of action. Sport-related cases will be presented pertinent to each area.

Equal Protection

Many challenges to sex-based classifications are premised on the constitutional prohibition against denying to any person within its (a state's) jurisdiction the equal protection of the laws. This prohibition, found in the fourteenth amendment, is a constitutional check on governmental classification systems. No person or group of persons should be singled out for different treatment from similarly situated people unless a constitutionally permissible reason exists for doing so.

To set the stage for equal protection review, a plaintiff must show that there is state action and that there is a method of classification which unequally burdens or denies the plaintiff's interests. After these two points are met, the question becomes what level of judicial review will be used.

There are three levels of judicial review: (1) strict scrutiny, (2) intermediate scrutiny, and (3) the rational relationship test. The choice of which type of review is appropriate depends upon the importance of the plaintiff's interest. Classifications which impinge upon a fundamental right (e.g., freedom of speech, right to vote), or which are made on the basis of a suspect classification (race or national origin) require strict scrutiny (i.e., the classification must be necessary to achieve a compelling state interest). In the middle of the spectrum, and pertinent to the discussion of this section, classifications made on the basis of sex require intermediate scrutiny (i.e., the classification must serve an important state interest and be substantially related to that objective). Until the

160. Id. at 582.
161. Buss at 23.

1970's, sex-based classifications were reviewed under the less stringent rational relationship test. Sex-based classifications now receive intermediate scrutiny as a result of two Supreme Court decisions in that decade.[162] Finally, most classifications found in social welfare and economic legislation are reviewed under the rational relationship test (i.e., the classification need only have a reasonable relationship to a legitimate legislative purpose). Thus, the level of judicial review which is used in large measure controls the outcome of the case. The rational relationship test is very deferential to governmental concerns whereas the strict scrutiny test is exceedingly favorable to a plaintiff's individual interests.

Female Participants — No Separate Opportunity. Excluding females from participating in male sport programs when no comparable athletic opportunities exist for females in a particular sport is, according to most courts, impermissible. *Brenden v. Independent School District 742*[163] is indicative of the position of most courts which have considered this question. In that case, girls were barred from competition with boys in cross-country skiing, running, and tennis although no teams existed for girls. The court invalidated the athletic association rule which prevented the girls from competing using a fourteenth amendment equal protection analysis. Other courts have reached a similar result in cases dealing with baseball,[164] cross-country,[165] golf,[166] and soccer.[167] Finally, in a recent case, a female high school sophomore sought a restraining order to prevent the high school athletic association from refusing her permission to wrestle on the high school boys' team. The district court granted her a temporary restraining order since the court failed to find a substantial relationship between the rule prohibiting girls from the wrestling team and the asserted goal of protecting the health and safety of female students. In this case the rule operated on the assumption that females are innately inferior, but no evidence was presented to show that this plaintiff was incapable of safely participating with male wrestlers.[168]

This same result has been reached by state courts using state equal rights amendments. For example, the Washington Supreme Court held that a rule which prohibited girls from participating on interscholastic

162. Reed v. Reed, 404 U.S. 71 (1971); Craig v. Boren, 429 U.S. 190 (1976).

163. Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973).

164. Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976).

165. Bednar v. Nebraska School Activites Ass'n, 531 F.2d 922 (8th Cir. 1976); Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1974).

166. Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972); Haas v. South Bend Community School Corp., 289 N.E.2d 495 (Ind. 1972).

167. Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977).

168. Saint v. Nebraska School Activities Ass'n, 684 F. Supp. 626 (D. Neb. 1988).

football teams was unconstitutional under both federal and state provisions.[169]

Female Participants — Separate Teams Provided. The majority of courts uphold segregation of the sexes if comparable opportunities exist for females to participate in a particular sport. Thus, the "separate but equal" defense which has been rejected in racially-based segregation cases is still viable for sex-based segregation. For example, a female plaintiff brought suit to play on the boys' basketball team because she needed that level of competition to enhance her basketball skills. The Seventh Circuit rejected her argument[170] and plaintiff's petition to vacate the stay of her initial injunction was denied, with opinion, by Mr. Justice Stevens, sitting as Circuit Justice.[171] In his opinion, gender-based classifications are necessary in competitive contact sports to avoid the substantial risk that boys would dominate the girls' programs.[172] Other cases have upheld the separate but equal doctrine in the sports of soccer[173] and swimming.[174]

Male Participants — No Separate Opportunity. The courts are split on the question of whether a male plaintiff may be allowed to participate on female teams when no separate male team exists. In a Ninth Circuit decision, the court forbade male participation on a girls' volleyball team.[175] The rationale was that exclusion of males promoted equal athletic opportunities for both sexes and was necessary to redress past discrimination against females. Other courts have excluded males from participation if there was a history of limited athletic opportunities for females.[176]

However, a court in Rhode Island allowed a high school boy to participate on the girls' volleyball team. This court's rationale was that, although the fourteenth amendment may be used to address matters of past discrimination, there was no past discrimination at issue here because in the sport of *volleyball*, females had not been historically disadvantaged.[177] Another court used its state's equal rights amendment to allow participation by males on female teams.[178]

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169. Darrin v. Gould, 540 P.2d 882 (Wash. 1975).

170. O'Connor v. Board of Educ. of School Dist. No. 23, 645 F.2d 578 (7th Cir. 1981).

171. *Id.* 449 U.S. 1301 (Stevens, Cir. J. 1980).

172. *Id.* at 1307.

173. Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977).

174. Ritacco v. Norwin, 361 F. Supp. 930 (W.D. Pa. 1973); Striebel v. Minnesota High School League, 321 N.W.2d 400 (Minn. 1982).

175. Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982).

176. Forte v. Board of Educ., 431 N.Y.S.2d 321 (Sup. Ct. 1980); Petrie v. Illinois High School Ass'n, 394 N.E.2d 855 (Ill. Ct. App. 1979).

177. Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D.R.I.), *vacated as moot* 604 F.2d 733 (1st Cir. 1979).

178. Attorney General v. Massachusetts Interscholastic Athletic Ass'n, 393 N.E.2d 284 (Mass. 1979).

Summary. Equal protection challenges to sex-based classifications in athletics are almost always successful if the female plaintiff has no other opportunity to participate. If, however, there is a separate girls' team, most courts hold that "separate but equal" is a viable defense and female plaintiffs most often do not prevail. Male plaintiffs who wish to participate on female teams are faced with a split of authority on that question.

Title IX

In addition to the constitutional claims discussed above, there are also statutory methods available to challenge sex-based classifications in sport. Title IX of the Education Amendments of 1972 to the Civil Rights Act of 1964 is the most well-known statutory challenge available in the realm of education. Section 901(a) of title IX states that "no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."[179] Although title IX became law in 1972, the Department of Health, Education, and Welfare did not finalize policy interpretations of the law until 1979.

The most critical question in title IX litigation has been the applicability of the statute to athletic programs. This question arose because of an interpretive issue (i.e., does the language "program or activity receiving federal financial assistance" mean that title IX applies to *all* programs in an institution which receive federal financial assistance — institutional approach — or does title IX apply only to programs which directly receive federal funds — program-specific approach? The matter is of the utmost importance in dealing with athletic programs because very few athletic departments receive direct federal financial assistance.

Federal courts which addressed the matter were split on whether to adopt the narrow "program-specific" approach[180] or the broader "institutional" approach.[181] The Supreme Court spoke on the issue in its 1984 decision, *Grove City College v. Bell.*[182] The Court adopted the "program-specific" approach which effectively negated the applicability of title IX to athletic programs. In the immediate aftermath of this monumental decision, plaintiffs with pending sex discrimination suits against athletic departments dropped their title IX allegations and the Department of Education closed a number of pending title IX investigations.

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179. 20 U.S.C. § 1681 (a).

180. Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981); Bennett v. West Texas State Univ., 525 F. Supp. 77 (N.D. Tex. 1981).

181. Haffer v. Temple Univ., 524 F. Supp. 531 (E.D. Pa. 1981).

182. Grove City v. Bell, 465 U.S. 555 (1984).

For approximately four years after *Grove City*, legislators proposed various measures to reverse the impact of the decision. Finally, the Civil Rights Restoration Act was passed in March of 1988. The Act established the "institutional" approach and provides that if *any* program or activity within an institution receives federal financial assistance then all programs are subject to title IX.

The Equal Pay Act (EPA) and Title VII

There are two other statutory remedies which should be discussed in connection with sex-based discrimination in employment. The Equal Pay Act prohibits wage discrimination "on the basis of sex" between employees who perform "equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions."[183] Differences in payment rates are permissible if they result from: (1) a seniority system, (2) a merit system, (3) production output or quality, or (4) a differential based on any other factor than sex.[184]

The difficult question in most EPA cases which involve coaches is whether the plaintiff's employment position can be considered to be "substantially equal" to the higher paying position held by a member of the opposite sex. The compared positions need not be identical but the courts have rejected the notion that "coaching is coaching."[185] Therefore, the factors which are looked at to determine whether the positions are substantially equal are: (1) skill required, (2) effort required, (3) responsibility required, and (4) conditions under which the jobs are performed.

In regard to the first factor, the *positional* skills required must be compared not the skill or ability of particular persons.[186] In terms of effort, comparison will be made in terms of the amount or degree of effort necessary. Courts will look at such criteria as: (1) sport coached, (2) number of games played, (3) number of students coached, (4) length of season, and (5) time spent in practice.[187] Third, responsibility is looked at in terms of the importance of the job obligations and accountability.[188] Finally, working conditions can include the degree to which work

183. 29 U.S.C. § 206(d)(1).
184. *Id.*
185. EEOC v. Madison Community Unit School Dist. No. 12, 818 F.2d 577 (7th Cir. 1987).
186. Hein v. Oregon College of Educ., 718 F.2d 910 (9th Cir. 1983).
187. EEOC v. Madison Community Unit School Dist. No. 12, 818 F.2d 577 (7th Cir. 1987).
188. Brock v. Georgia Southwestern College, 765 F.2d 1026 (11th Cir. 1985).

was performed indoors or outdoors and differences in physical surroundings.[189]

After a prima facie case is established, the burden shifts to the employer to demonstrate the applicability of one of the four exceptions mentioned above. Most of the EPA coaching cases deal with the last exception (i.e., that the pay differential is due to a factor other than sex). One of the critical questions is whether a coaching salary based solely on the sex of the persons coached is a "factor other than sex." This problem may often be raised, for example, by a woman coach of the girls' basketball team who is paid substantially less than the male coach of the boys' basketball team. The institutional response is often that the pay rate is based, not on the sex of the coach, but on the sex of the persons coached.

For EPA purposes, if the sex of the coach is inextricably linked with the sex of the student, the defense of a "factor other than sex" may not be upheld. For example, in a Seventh Circuit case, women, with rare exceptions, were assigned to coach the girls' teams and men coached the boys. In this case, the court found that the defense of a "factor other than sex" was not applicable.[190] This is an important case because the Equal Employment Opportunity Commission consistently takes the position in title VII cases that pay differences based on the sex of the students coached cannot be the basis of a disparate treatment claim. Therefore, EPA relief may lie, assuming the facts are proper, where a title VII case may fail.

The Equal Pay Act covers only questions of sex discrimination in wages. Title VII, however, is a broader statute and may cover discrimination claims in hiring, promotion, or firing. Title VII prohibits an employer from discriminating against any individual with respect to hiring, firing, compensation, terms, conditions, or privileges of employment "because of such individual's race, color, religion, sex, or national origin."[191]

There are two legal theories which are used in title VII litigation. First, disparate treatment requires a plaintiff to show a discriminatory motive by the employer. A plaintiff must show membership in a protected class, that he applied for the position having the required credentials, and was rejected. If the plaintiff can establish the above points, the burden is on the employer to show a legitimate nondiscriminatory reason for the plaintiff's rejection. Even if the employer can do so, the plaintiff may still argue that the defendant's alleged reason was simply a pretext for a discriminatory motive.

Second, disparate impact is a legal theory which requires a showing that a facially neutral practice had a disproportionate impact on the

189. EEOC v. Madison Community Unit School Dist. No. 12, 818 F.2d 577 (7th Cir. 1987).

190. *Id.*

191. 42 U.S.C. § 2000e-2(a).

protected group to which the plaintiff belongs. After establishing this, the defendant must show that the policy is justified by business necessity.

In one title VII case, a female physical education teacher sued the school district to recover for the allegedly discriminatory denial of her application for the position of athletic director. In this case, the defendant school district argued that the position for which the plaintiff applied was not "available" since the position was not simply athletic director but rather head football coach/athletic director, a position for which she was clearly not qualified. The court found that this "combined" position was simply an impermissible preference which unlawfully excluded the plaintiff from consideration for the position of athletic director.[192]

In another case which was less favorable to the plaintiff, a female applicant for a teaching position was rejected. Later, the position was filled by a male who could also coach football. The Eighth Circuit concluded that the district had a legitimate nondiscriminatory reason for not hiring the plaintiff. In this situation, the male applicant was better qualified.[193]

Finally, a female assistant softball coach brought a sex discrimination suit against the university when it failed to promote her to full-time status. The plaintiff had been a part-time softball coach since 1977. In 1983 she requested that she be given full-time status but her request was denied. There were similar requests from other part-time coaches at that time and the university did grant full-time status to the male assistant coach of women's gymnastics. The plaintiff alleged that the consent decree which existed due to a prior sex discrimination suit was violated since the university did not use written, sex-neutral criteria to make the decision regarding her full-time appointment. The Eighth Circuit found her argument unpersuasive. The decision made here was a programmatic and budgetary decision which did not require the use of the criteria set forth in the consent decree.[194]

Important Cases in Sex-based Discrimination

Before closing this chapter, there are two cases in sex-based discrimination which are worth noting. First, *Blair v. Washington State University* was a class action lawsuit brought on behalf of female student-athletes and coaches at that institution. The action was brought pursuant to the provisions of the state equal rights amendment. In 1983, the trial court found that the university had discriminated against the plaintiffs and awarded monetary damages and injunctive relief. A part

192. Wynn v. Columbus Mun. Separate School Dist., 692 F. Supp. 672 (N.D. Miss. 1988).
193. Grebin v. Sioux Falls Indep. School Dist. No. 49-5, 779 F.2d 18 (8th Cir. 1985).
194. Sennewald v. University of Minn., 847 F.2d 472 (8th Cir. 1988).

of the injunctive relief included the imposition of formulas to be used by the university to bring the women's program into comparison with the men's. The percentage of money and scholarships for women was increased to reflect the percentage of women enrolled at the university. However, the judge excluded the sport of football from the calculations.

The Supreme Court of Washington reversed the lower court on the question of excluding the football budget from the calculations. The exclusion of football perpetuated the discriminatory policies and diminished the opportunities for females. There was no legal reason for excluding football.[195]

The case of *Ridgeway* v. *Montana High School Association* is an interesting case because of the use of a facilitator to help resolve the matter. *Ridgeway* was also a class action suit which alleged that female athletes in the state of Montana were discriminated against in a variety of ways including: (1) the number of sports available, (2) seasons the sports were available, (3) length of seasons, (4) scheduling of practice and games, (5) access to facilities, equipment, coaching, trainers, and transportation, and (6) differential publicity. The matter was dismissed after the parties agreed to a settlement agreement. A facilitator was appointed to implement the settlement agreement which addressed the various inequities raised in the lawsuit.

Thereafter, the plaintiffs alleged that the agreement was violated since the high school association did not take action to align the girls' basketball and volleyball seasons with the national norm. The court found for the defendants.[196] The Ninth Circuit affirmed this decision on the basis that the "law of the case" did not mandate the change of seasons.[197]

195. Blair v. Washington State Univ., 740 P.2d 1379 (Wash. 1987).

196. Ridgeway v. Montana High School Athletic Ass'n, 633 F. Supp. 1564 (D. Mont. 1986).

197. Ridgeway v. Montana High School Athletic Ass'n, 858 F.2d 579 (9th Cir. 1988).

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